

Testimony of Christopher Sprigman  
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Re: H.R. 5055

Given July 27, 2006, before the  
Committee on the Judiciary,  
U.S. House of Representatives,  
Subcommittee on Courts, the Internet, and  
Intellectual Property

My name is Christopher Sprigman; I am an Associate Professor at the University of Virginia School of Law. In my role as a law professor, and before that in my career as a lawyer with the Antitrust Division of the United States Department of Justice and in private practice, I have focused on how legal rules – especially rules about intellectual property – affect innovation. Over the past two years, along with Professor Kal Raustiala of the UCLA School of Law, I have spent a considerable amount of time studying the fashion industry’s relationship to intellectual property law. Professor Raustiala and I have written an academic article on the topic, entitled *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*. This article, which I am submitting along with my written testimony, will be published in December in the Virginia Law Review. The comments I’ll make here today will refer to the findings of that article.

*In brief, for reasons I will explain, Professor Raustiala and I are opposed to H.R. 5055.* The Framers gave Congress the power to legislate in the area of intellectual property. But for 217 years Congress has not seen the need to extend IP rules to cover fashion designs. During that period the American fashion industry has grown and thrived, and American consumers have enjoyed a wide range of apparel offerings in the marketplace. We are skeptical that Congress ought to begin regulating fashion design now, given the success of the existing system.

We oppose H.R. 5055 for 3 principal reasons:

- 1) The fashion industry is not like the music, motion picture, book, or pharmaceutical industries. Over a long period of time, it has

been both creative and profitable without any IP rules protecting its original designs. Unlike in many other creative industries, copying does not appear to cause harm to the fashion industry as a whole.

2) Fashion design protection has been tried in Europe and has had little effect. Design firms across the Atlantic copy others' designs just the way they do here in the U.S.

3) We fear that a primary effect of H.R. 5055 will be extensive and costly litigation over what constitutes infringement. As such, H.R. 5055 is a lawyer-employment bill, not a fashion-industry protection bill.

In my brief time here let me expand on these 3 points.

***Our first point is that this bill is an unnecessary and unwise intervention in the marketplace.*** The American fashion industry has become a powerhouse in the decades since World War II. The industry does business in excess of \$180 billion per year, and U.S. firms play a substantial role in a global fashion industry worth almost \$1 trillion annually. In 2005, the fashion industry grew more quickly than the economy as a whole, and the industry's strong recent growth reflects its robust long-term performance. According to recent data from the Bureau of Economic Analysis, sales of apparel and shoes have registered uninterrupted annual increases between 1945 and 2004, growing during this period more than twenty-fold. So we see growth and profit in the fashion industry, and we also see vibrant competition. New designers and companies regularly rise to prominence and compete for the public's attention with innovative new designs. The fashion industry produces a huge variety of apparel, and innovation occurs at such a pace that styles change rapidly and goods are produced for consumers at every conceivable price point. In short, the fashion industry looks exactly as we would expect a healthy creative industry to look.

The important point here is that all of the fashion industry's growth and innovation has occurred without any intellectual property protection in the U.S. for its designs. Indeed, *never in our history has Congress granted legal protection to fashion designs.* From the industry's beginnings copying has been very common both in the U.S. and abroad. Designers and fashion commentators were talking about design copying back in the 1920s and 1930s. Unsurprisingly, this is not the first time that Congress has considered extending the IP laws to fashion designs. But Congress has always refrained from making this change to our tradition – wisely, in our view. Unlike in the music, film, or publishing industries, copying of fashion designs has never emerged as a threat to the survival of the industry.

Why is that? In our article, Professor Raustiala and I explain how copying and creativity actually work together in the fashion industry. This argument is grounded in the fact that fashion is cyclical and driven by popular trends. Styles come and go quickly as many consumers seek out new looks well before their clothes wear out. This is not

new: as Shakespeare put it in *Much Ado About Nothing*, “The fashion wears out more apparel than the man.” But the result is that for fashion, copying does not deter innovation and creativity. It actually speeds up the rate of innovation. Copying of popular designs spreads those designs more quickly in the market, and diffuses them to new customers that, often, could not afford to buy the original design. As new trends diffuse in this manner, they whet the appetite of consumers for the next round of new styles. The ability to be copied encourages designers to be more creative, so as to create new trends that capture the attention of consumers. The existing legal rules also help the industry communicate these trends to consumers. In order for trendy consumers to follow trends, the industry has to communicate what the new fashion is each season or year. The industry as a whole does this by copying and making derivatives that take features of a popular design and add new features – this is one of the important ways in which trends are established.

In sum, it is the preference of consumers for change in clothing designs that incentivizes creativity in the fashion industry – not intellectual property rules. Copying simply accelerates this process, intensifying consumers’ desire for new styles, and increasing consumers’ willingness to spend on the industry’s next set of design innovations. Congress does not need to step in to alter the market and protect producers. Indeed, if Congress acts to hinder design copying, it may succeed only in depressing demand for new styles, slowing the industry’s growth, and raising prices for consumers.

***Our second point pertains to the E.U.’s experience, which suggests that design protection does not affect copying.*** In 1998 the European Union adopted a Directive on the Legal Protection of Designs. European law provides extensive protection for apparel designs, but the law does not appear to have had any appreciable effect on the conduct of the fashion industry, which continues to freely engage in design copying.

Some may argue that since Europe has design protection legislation, the U.S. should have regulation too. But the European experience suggests precisely the opposite, for two reasons. First, fashion designers have not used the E.U. law very much. We have looked closely at the E.U. registry of designs, and very few designers and design firms have registered their designs – an act that is a prerequisite for protection under the E.U. law, and would also be required for protection under H.R. 5055. Second, copying of fashion designs is just as common in Europe as it is here in the U.S. Indeed, many large fashion copyists, including large retail firms such as H & M, Zara, and Topshop, are European. The law in Europe has had little or no effect on copying, or on innovation in the industry. While the E.U. prohibits fashion design copying, the industry continues to behave as it always has – copying and making derivative works.

Although we find the E.U. law has had little effect, we fear that a similar law in the U.S. may actually have a *harmful* effect. This brings me to our third and final point.

***Our third point is that while H.R. 5055 is unlikely to do much good, it potentially could cause significant harm.*** Unlike most countries in Europe, which have relatively weak civil litigation systems, we Americans are, for better or worse,

accustomed to resolving disputes through the courts. As a result, the U.S. is a society teeming with lawyers – including, unlike in Europe, a class of litigation entrepreneurs who turn to the federal courts readily to seek leverage in competitive industries.

Given our significant differences from Europe in this regard, we fear that H.R. 5055 might turn the industry’s attention away from innovation and toward litigation. We foresee extensive litigation over the standard of infringement in the proposed bill. Drawing the line between inspiration and copying in the area of clothing is very, very difficult and likely to consume substantial judicial resources. But however the lines are drawn, the result will be a chilling effect on the industry. Every designer and every firm will be obliged to clear new designs through a lawyer. Individual designers and small firms will be particularly disadvantaged – they are the least likely to be able to afford the lawyers’ fees that will be the new price of admission to the industry. Over time, the fashion industry might begin to look more like the music and motion picture industries – i.e., dominated by a few large firms. It is hard to imagine an industry re-configured in this way producing the same rich variety of new designs that today’s healthy, competitive fashion industry yields. We believe that the end result of H.R. 5055 could be less consumer choice, fewer opportunities for young designers and small firms to break into the industry, and reduced consumption across the board of fashion goods.

In conclusion, the fashion industry thrives by rapidly creating new designs. Via this continuous re-definition of what is “in style,” the industry sparks demand by consumers for new apparel. This process results in consumption of fashion goods at a level above what would otherwise occur. It also permits many apparel items to be sold at lower prices than would be possible were fashion design protected by the intellectual property laws. To remain healthy, the fashion industry depends on open access to designs and the ability to create new designs that are derivative of them. The industry has thrived despite the lack of design protection; we are very hesitant to interfere with such success.

But we also fear that H.R. 5055 may cause harm. In sum, were it necessary to impose design protection rules to protect the American fashion industry, we would support amending the U.S. Code for the first time in our history to include fashion design. But our research suggests that it is not necessary, that we have had the right rule for the past 217 years, and that Congress should be content to leave the industry to get on with the business of creating innovative new fashions.

***FORTHCOMING – VIRGINIA LAW REVIEW*****THE PIRACY PARADOX:  
INNOVATION AND INTELLECTUAL PROPERTY IN FASHION  
DESIGN****Kal Raustiala\* and Christopher Sprigman\*\*****August 2006 DRAFT**

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\*\* Associate Professor, University of Virginia School of Law. The authors wish to thank Michael Abramowicz, Kerry Abrams, Michal Barzuza, Lillian BeVier, Laura Bradford, Julie Cohen, Terry Fisher, Brett Frischmann, Brandon Garrett, Larry Helfer, Paul Hoffert, Ed Kitch, Mark Lemley, Larry Lessig, Michael Madison, Paul Mahoney, Neil Netanel, David Nimmer, Dotan Oliar, Glen Robinson, Rebecca Tushnet, Rip Verkerke, Eric Von Hippel, and participants at presentations at Columbia Law School, the MIT Innovation Lab, the Center for Internet and Society at Stanford Law School, and at a Berkman Center “cybercamp” hosted by Pam Samuelson for their helpful comments on earlier drafts. The authors also wish to thank Annette Kur for her substantial assistance with E.U. materials, and Michelle Morris, Charnan Jessica Cooke, Christen Raymond, Kristen Riemenschneider, Tyler Slay and Wade Kackstetter for expert research assistance. A skeletal version of some of the arguments in this paper appeared in Kal Raustiala, *Fashion Victims*, *The New Republic Online*, March 15, 2005. Any errors are, of course, entirely the authors’ own.

It is surprising that in this tremendous field [of fashion], ranking conservatively among the first five in the United States, such unregulated and primitive conditions obtain that unreserved pilfering is tolerated and openly permitted.

The leaders of this gigantic segment of our commercial life . . . have completely ignored a situation that is eating away at the very roots of its existence. Style and creation constitute the life blood of this multi-billion dollar business. Without them, the industry would fade into obscurity. Yet, for some unknown reason, style piracy is treated more indulgently than much lesser offenses involving deprivation of one's rights and property.

-- Samuel Winston, Inc. v. Charles James Services, Inc., 159 N.Y.S.2d 716, 718 (Sup. Ct. 1956).

## **INTRODUCTION**

The standard justification for intellectual property rights is utilitarian. Advocates for strong intellectual property (IP) protections note that scientific and technological innovations, as well as music, books, and other literary and artistic works, are often difficult to create but easy to copy. Absent IP rights, they argue, copyists will free-ride on the efforts of creators, discouraging future investments in new inventions and creations. In short, copying stifles innovation.

This argument about the effects of copying is logically straightforward, intuitively appealing, and well reflected in American law. Yet few seem to have noticed a significant empirical anomaly: the existence of a global industry that produces a huge variety of creative goods in markets larger than those for movies, books, music, and most scientific innovations,<sup>1</sup> and does so without strong IP protection. Copying is rampant, as

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<sup>1</sup> According to the 2002 Economic Census, the U.S. book publishing industry reported revenues of \$27 billion. See U.S. Bureau of the Census, 2002 Economic Census, available at <<http://www.census.gov/econ/census02>>. Annual revenues for 2001 for the U.S. motion picture industry are estimated at approximately \$57 billion, U.S. Bureau of the Census, 2001 Service Annual Survey: Information Sector Services, Table 3.0.1., available at <<http://www.census.gov/svsd/www/sas51.html>>. Annual revenues for 2004 for the recording industry are estimated at approximately \$12 billion, see <<http://www.riaa.com/news/newsletter/pdf/2004yearEndStats.pdf>>. The U.S. apparel industry reported gross revenues for 2004 exceeding \$173 billion. See Press Release, NPDFashionworld, Reports 2005 U.S. Retail Apparel Sales Up After Three Years of Decline, Feb. 23 2005, available at <<http://www.npd.com/press/releases/press050223>>. Globally, the fashion industry is said to produce

the standard account would predict. Competition, innovation, and investment, however, remain vibrant.

That industry is fashion. Like the music, film, video game, and book publishing industries, the fashion industry profits by repeatedly originating creative content. But unlike those other industries, the fashion industry's principal creative element – its apparel designs – is outside the domain of IP law. And as a brief tour through any fashion magazine or department store will demonstrate, while trademarks are well-protected against piracy, design copying is ubiquitous. Nonetheless the industry develops a tremendous variety of clothing and accessory designs at a rapid pace. This is a puzzling outcome. The standard theory of IP rights predicts that extensive copying will destroy the incentive for new innovation. Yet fashion firms continue to innovate and create at a rapid clip—precisely the opposite behavior of that predicted by the standard theory.

Despite this anomaly, few legal commentators have considered fashion design in the context of IP law.<sup>2</sup> Those who have done so have almost uniformly criticized the

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revenues of about \$784 billion. See Nurbhai A. Safia, *Style Piracy Revisited*, 10 *J. L. & Policy* 489 (2002). It may well be, as some commentators on this paper have suggested to us, that the “IP content” of the film or music industry's products is higher than the “IP content” of fashion items. We are unsure how to measure this in any reliable way. But in any event even if this suggestion is accurate, these numbers illustrate that by whatever metric may be used, fashion is a very large economic sector when compared to the more traditional foci of IP scholarship and thus even if fashion's per-item IP content is much lower the aggregate value of this content across the industry is still quite high.

<sup>2</sup> Jessica Litman has noted in passing fashion's unusual disconnection with copyright. See Jessica Litman, *The Exclusive Right to Read*, 13 *Cardozo Arts & Ent. L.J.* 29 (1994). Litman's formulation of the fashion industry's challenge to IP orthodoxy is worth considering in full:

Imagine for a moment that some upstart revolutionary proposed that we eliminate all intellectual property protection for fashion design. No longer could a designer secure federal copyright protection for the cut of a dress or the sleeve of a blouse. Unscrupulous mass-marketers could run off thousands of knock-off copies of any designer's evening ensemble, and flood the marketplace with cheap imitations of haute couture. In the short run, perhaps, clothing prices would come down as legitimate designers tried to meet the prices of their free-riding competitors. In the long run, though, as we know all too well, the diminution in the incentives for designing new fashions would take its toll. Designers would still wish to design, at least initially, but clothing manufacturers with no exclusive rights to rely on would be reluctant to make the investment involved in manufacturing those designs and distributing them to the public. The dynamic American fashion

current legal regime for failing to protect apparel designs. For example, one article argues that “society must protect the great talent of fashion designing. Courts need to adequately safeguard innovation and creativity in the fashion business.”<sup>3</sup> Another describes fashion designers as “scorned by the copyright system” and subject to an “injustice” that must be fixed by Congress.<sup>4</sup> A third characterizes the existing legal regime as “ridiculous” and declares that the “bizarre blindness towards the inherent artistry and creativity of high fashion can no longer be ignored.”<sup>5</sup> Despite these exhortations, the fashion industry itself is surprisingly quiescent about copying. Fashion firms take significant, costly steps to protect the value of their trademarked brands. But they largely appear to accept appropriation of their original designs as a fact of life. Design copying is occasionally complained about, but is more often celebrated as “homage” than attacked as “piracy.”<sup>6</sup>

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industry would wither, and its most talented designers would forsake clothing design for some more remunerative calling like litigation. And all of us would be forced either to wear last year’s garments year in and year out, or to import our clothing from abroad.

Id. at 39. Consideration of fashion and IP is rising; see also cites in Note 3 *infra*, Kal Raustiala, *Fashion Victims*, *The New Republic Online* (March 15, 2005), and Jonathan Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property and the Incentive Thesis*, 91 *Va. L. Rev.* 1381 (2005). Recently, Susan Scafidi has created a blog addressing issues of fashion and IP. See *Counterfeit Chic*, available at <http://www.counterfeitchic.com/>.

<sup>3</sup> Karina Terakura, *Insufficiency of Trade Dress Protection: Lack of Guidance for Trade Dress Infringement Litigation in the Fashion Design Industry*, 22 *U. Haw. L. Rev.* 569, 618-19 (2000). For articles arguing for expanded protection for fashion designs, see, e.g., Samantha L. Hetherington, *Fashion Runways are No Longer the Public Domain: Applying the Common Law Right of Publicity to Haute Couture Fashion Design*, 24 *Hastings Comm. & Ent. L. J.* 43 (2001); S. Priya Bharathi, *There is More Than One Way to Skin a Copycat: The Emergence of Trade Dress to Combat Design Piracy of Fashion Works* 27 *Tex. Tech L. Rev.* 1667 (1996); Jennifer Mencken, *A Design for the Copyright of Fashion*, *B.C. Intell. Prop. & Tech. F.* (1997); Leslie Hagin, *A Comparative Analysis of Copyright Laws Applied to Fashion Works: Renewing the Proposal for Folding Fashion Works into the United States Copyright Regime*, 26 *Tex. Int’l L. J.* 341 (1991).

<sup>4</sup> Briggs, *supra* n.\_\_\_\_ at 213.

<sup>5</sup> Heatherington, *supra* n.\_\_\_\_ at 71.

<sup>6</sup> See Brian Hilton, Chong Ju Choi, & Stephen Chen, *The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues*, 55 *J. of Business Ethics* 345, 350-51 (2004). As we discuss below, earlier this year several fashion designers supported a bill introduced into Congress that would amend an existing design-protection statute to encompass fashion design. [TO COME]

This diffidence stands in striking contrast to the heated condemnation of piracy – and associated vigorous legislative and litigation campaigns – in other creative industries.

Why are the norms about copying in the fashion industry so different from those in other creative industries? Why, when other major content industries have obtained (and made use of) increasingly powerful IP protections for their products, does fashion design remain mostly unprotected? That the fashion industry produces high levels of innovation, and attracts the investment necessary to continue in this vein, is a puzzle for the orthodox justification for IP rights. This article explores this puzzle and offers an explanation for it. We argue that the fashion industry operates within a regime of free appropriation in which copying fails to deter innovation because, counter-intuitively, copying is not very harmful to originators. Indeed, we suggest copying may actually promote innovation and benefit originators. We call this the “piracy paradox.” We explain how the piracy paradox works, and how copying functions as an important element of – and perhaps even a *necessary predicate* to – the apparel industry’s swift cycle of innovation. In so doing, we aim to shed light on the creative dynamics of the industry. But we also hope to spark further exploration of a fundamental question of IP policy: to what degree are IP rights necessary in particular industries to induce investment in innovation? Does the piracy paradox occur only in the fashion industry, or are stable low-IP equilibria imaginable in other content industries as well?

This article proceeds in three parts. Part I provides a brief overview of the apparel industry, examines the industry’s widespread practice of design copying, and distinguishes design copying from “counterfeits” or “knock-offs” that involve the copying of protected trademarks. Our focus is the copying of apparel designs, not brandnames.<sup>7</sup>

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<sup>7</sup> It is also important to distinguish textile designs from apparel designs, though there is sometimes overlap. Textile patterns can be copyrighted (and sometimes trademarked, as in the case of Burberry’s signature plaid) and are increasingly the subject of knock-offs. See Evelyn Iritani, “Material Grievances,” Los Angeles Times, C1 (Jan 15, 2006) (discussing recent lawsuits initiated by LA-based textile designers.)

In Part II, we offer two interrelated models – *induced obsolescence* and *anchoring* – that help account for the stability of the fashion industry’s low-IP equilibrium. These arguments reflect two related features of fashion goods: first, that the value of fashion items is partly status-based, or “positional”, and second, that fashion is cyclical – i.e., styles fall out of fashion and are replaced, often seasonally, by new styles. These twin features help to explain why design copying can be counterintuitively beneficial for designers, and hence help account for the remarkable persistence of the permissive legal regime governing fashion design. Later in Part II, we consider, and largely reject, several alternative explanations for the relative absence of IP protection. These include structural features of American copyright doctrine; collective action problems in the industry; first-mover advantage; and rival interests between fashion designers and retailers.

In Part III we turn to the broader implications of the fashion case. Is the apparel industry’s ecology of innovation unique, or does its juxtaposition of high levels of creativity with low levels of formal legal protection suggest something about optimality in IP rules? Apparel is not the only industry in which status and positionality play a role in consumer behavior; nor is it the only area of creative innovation that lacks IP protection. Accordingly, at the close of this article we offer some initial observations about the implications of our analysis of the fashion industry for other creative industries.

## **I. THE FASHION INDUSTRY**

### **a. Fashion Industry Basics**

The global fashion industry sells more than \$750 billion of apparel annually.<sup>8</sup> While the industry markets apparel everywhere on earth, the creative loci for the global fashion industry are Europe and the United States, and, to a lesser degree, Japan. In Paris, Milan, London, New York, Tokyo, and Los Angeles there are large concentrations of designers and retailers as well as the headquarters of major fashion producers.

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<sup>8</sup> See Safia A. Nurchai, *Style Piracy Revisited*, 10 *J. L. & Policy* 489 (2002).

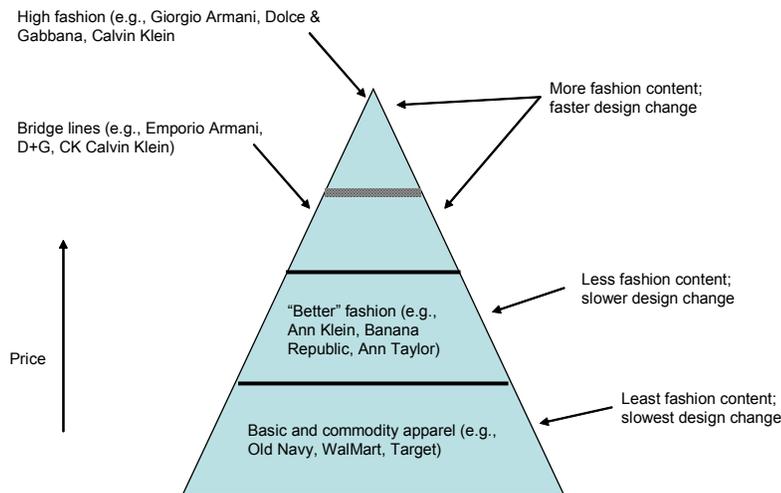
Major fashion design firms, such as Gucci, Prada, Armani, Ralph Lauren, and Chanel, produce new apparel designs continually, but market their design output via collections introduced seasonally, in an annual series of runway shows. Fall shows are held in consecutive weeks in February and March, first in New York, then London, then Milan, and finally in Paris. Spring shows are held in consecutive weeks in September and October, in the same cities and order.

The fashion industry's products typically are segmented into broad categories that form what has been described as a fashion pyramid.<sup>9</sup> At the top is a designer category that includes three different types of products. First is a very small trade in haute couture – i.e., custom clothing, designed almost entirely for women, at very high prices.<sup>10</sup> Directly below is a much larger business in designer ready-to-wear clothing for women and men. This business is further segmented into prestige collections, and the lower-priced bridge collections offered by many famous designers. Another rung down is “better” fashion, an even larger category that consists of moderately priced apparel. Below that is a basic or commodity category. Figure A illustrates the fashion pyramid:

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<sup>9</sup> Peter Doeringer & Sarah Crean, *Can Fast Fashion Save the U.S. Apparel Industry?*, Society for the Advancement of Socio-Economics Working Paper (Draft dated June 15, 2005), available at <http://www.sase.org/conf2004/papers/doeringer-crean.pdf>.

<sup>10</sup> See Dana Thomas, *When High Fashion Meets Low*, *Newsweek* (Dec. 20, 2004); Elizabeth Hayt, *The Hands that Sew the Sequins*, *New York Times*, January 19, 2006 (noting that couture customers pay "upwards of...\$150,000 for an evening gown").



The borders between product categories are indistinct – some designers’ bridge lines, for example, market apparel as expensive as that found in others’ premium lines. In addition, particular forms of apparel (for example, jeans) appear in several categories. One difference between the categories is price; it increases as one ascends the pyramid. But the more important distinction, for our purposes, is the amount of fashion content, or design work, put into a garment. Apparel in the designer categories (couture and designer ready-to-wear apparel, as well as bridge lines) is characterized by higher design content and faster design turnover. Generally, apparel in the “better” and basic categories contains less design content and designs change less rapidly.<sup>11</sup>

Many fashion design firms operate at multiple levels of the pyramid. One example is Giorgio Armani, which produces couture, a premium ready-to-wear collection

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<sup>11</sup> We do not offer a precise definition of “design content” but our basic point is unobjectionable: clothing available from major fashion houses such as Prada contain more design innovation, generally speaking, than those from commodity retailers such as Old Navy. While Old Navy does produce new collections on a regular basis, the differences between old and new are, generally, smaller than the differences between Prada’s Spring 2005 and Spring 2006 collections, for example.

marketed via its Giorgio Armani collections, differentiated bridge lines marketed via its Armani Collezioni and Emporio Armani brands, as well as a “better clothing” line distributed in shopping malls via its Armani Exchange brand. Many firms producing high-end apparel have bridge lines, and a growing number of firms have begun to sell their clothing (albeit not exclusively) through their own retail outlets.<sup>12</sup>

Unlike many other content industries, such as film, music, and even publishing, which are increasingly concentrated, the fashion industry is quite deconcentrated, with a large number of firms of all sizes producing and marketing original designs (often using contract labor to manufacture those designs), and with no single firm or small set of firms representing a significant share of total industry output. Set against the fashion industry’s relative atomization, the persistence of the low-IP legal regime is even more puzzling. Economic theory suggests that firms operating in concentrated markets often need IP protection less, especially when they possess non-IP forms of market power (e.g., preferred access to distributors) that enable them to prevent free-riding and capture the benefits of their innovations. And yet the highly concentrated movie, music and commercial publishing industries have pushed for and enjoy broad IP protections for their works, whereas the deconcentrated fashion industry, which economic theory would suggest needs IP more, enjoys a far lower degree of protection. Public choice theory may provide an alternative explanation for fashion’s low-IP regime: perhaps the low-IP regime persists because the various fashion industry players, unlike those in film or music, cannot effectively organize to press their case before Congress. This hypothesis is plausible, but, as we argue in Part II below, it is not compelling.

## **b. Copying in the Fashion Industry**

### **i. Copy Control via Cartelization: The Fashion Originators’ Guild**

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<sup>12</sup> Press Release, Berns Communications Group Unveils 2005 Retail Strategies Noted by Leading Industry Experts, *Businesswire* (Dec. 6, 2004).

While more extensive today, design copying has long been a widespread practice in the fashion industry, especially in the U.S. As one observer notes, “Seventh Avenue has a long history of knocking off European designs.”<sup>13</sup> Indeed, a book on fashion published in 1951 contained an entire chapter on the topic, entitled “Style Piracy--A Fashion Problem,” which argued that design piracy “has long plagued the fashion field.”<sup>14</sup> In the interwar and early postwar periods the major French couture houses tacitly sanctioned some design copying, permitting a few U.S. producers to attend their Paris runway shows in exchange for “caution fees” or advance orders of couture gowns.<sup>15</sup> Wholesalers and retailers were barred from Parisian shows unless explicitly invited, and had to follow certain rules: no photos or sketches could be published until after a set date, and deliveries to customers and stores were staggered.<sup>16</sup> The technology of the time limited the swiftness with which copies could be made and marketed, but did not prevent copying. As one writer described the practices of copying Parisian designs in the 1950s, “The manufacturers flew in from New York, laid the (couture) clothes out on a table, and measured each seam. They went back to New York to copy the dresses and then [the Chicago-based department store Marshall] Field’s bought the copies.”<sup>17</sup> The British economist Arnold Plant described, in a work published in 1934, the already well-established and international practice of design copying:

[T]he leading twenty firms in the *haute couture* of Paris take elaborate precautions twice each year to prevent piracy; but most respectable “houses” throughout the world are quick in the market with their copies (not all made from a purchased original), and “Berwick Street” follows hot on their heels

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<sup>13</sup> Teri Agins, Copy Shops: Fashion Knockoffs Hit Stores Before Originals As Designers Seethe, Wall St. J. (Aug. 8, 1994).

<sup>14</sup> Jessie Stuart, *The American Fashion Industry* (Simmons College, 1951) at 28.

<sup>15</sup> Terri Agins, *The End of Fashion: How Marketing Changed the Clothing Business Forever* (Quill, 2000) at 23.

<sup>16</sup> *Id.* at 24.

<sup>17</sup> *Id.* at 175.

with copies a stage farther removed. And yet the Paris creators can and do secure special prices for their authentic reproductions of the original - for their “signed artist’s copies,” as it were.<sup>18</sup>

In 1932 the nascent U.S. industry established a nationwide cartel to limit copying within the small but growing ranks of American designers.<sup>19</sup> (Copying the designs of Parisian houses was apparently thought just fine). The “Fashion Originators’ Guild” registered American designers and their sketches and urged major retailers to boycott known copyists.<sup>20</sup> Retailers and manufacturers signed a “declaration of cooperation” in which they pledged to deal only in original creations.<sup>21</sup> Non-compliant retailers were subject to “red-carding” (i.e., boycott). Guild members who dealt with noncooperating retailers faced Guild-imposed fines.

The Fashion Originators’ Guild was effective at policing design piracy among its members. By 1936 over 60% of women’s garments selling for more than \$10.75 (approximately \$145 in 2005 dollars) were sold by Guild members.<sup>22</sup> But eventually the Guild fell afoul of the antitrust laws. In its 1941 decision in *Fashion Originators’ Guild of America v. FTC*,<sup>23</sup> the Supreme Court held the Guild’s practices to be unfair competition and a violation of the Sherman and Clayton Acts. The Court rejected the Guild’s argument that its practices “were reasonable and necessary to protect the

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<sup>18</sup> Arnold Plant, *the Economic Aspects of Copyright in Books*, 1 *Economica* (1934).

<sup>19</sup> The American fashion industry, headquartered in New York, really took off in the 1930s. See Leslie Burns and Nancy Bryant, *The Business of Fashion* (2nd ed., Fairchild Publications, 2002) at 16.

<sup>20</sup> Robert Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 *Cal. L. Rev.* 1293, 1363 (1996).

<sup>21</sup> Safia Nurbhani, *Style Piracy Revisited*, 10 *J. L. & Pol’y.* 489, 495-96 (2002).

<sup>22</sup> See *Fashion Originators’ Guild v. FTC*, 312 US 457 (1941).

<sup>23</sup> *Id.*

manufacturer, laborer, retailer, and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited all four.”<sup>24</sup>

At the same time, the Federal Trade Commission also terminated a similar cartel that organized the designers of women’s hats.<sup>25</sup> The Second Circuit, in upholding the FTC’s prosecution, acknowledged the utility of the cartel in preventing “style piracy”, but concluded that the law offered no remedy and the milliners’ coordinated self-help therefore could not be excused as pursuing a lawful end:

What passes in the trade for an original design of a hat or a dress cannot be patented or copyrighted. An “original” creation is too slight a modification of a known idea to justify the grant by the government of a monopoly to the creator; yet such are the whims and cycles of fashion that the slight modification is of great commercial value. The creator who maintains a large staff of highly paid designers can recoup his investment only by selling the hats they design. He suffers a real loss when the design is copied as soon as it appears; the imitator in turn reaps a substantial gain by appropriating for himself the style innovations produced by the creator’s investment. Yet the imitator may copy with impunity, and the law grants no remedy to the creator.<sup>26</sup>

As Robert Merges has noted, the only important differences between the early 20<sup>th</sup>-century fashion guilds and a formal IP right covering fashion designs were (1) the guilds were based on “an informal, inter-industry quasi-property right, rather than a formal statutory right”; (2) the guilds required concerted action to achieve any appropriability; and (3) the guilds “concentrated [their] enforcement efforts at the retail level by requiring retailers to sign contracts and by policing retailers, rather than targeting competing manufacturers.”<sup>27</sup> In short, the guilds were a fairly effective substitute for formal IP rights in fashion design. But this substitute lasted only until the early 1940s. Since then, fashion designs have remained unprotected by American law. Retailers and

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<sup>24</sup> Id. at 467.

<sup>25</sup> See *Millinery Creators’ Guild, Inc. v. FTC*, 109 F.2d 175 (2d Cir. 1940).

<sup>26</sup> Id. at 177.

<sup>27</sup> Merges, *supra* n. \_\_\_, at 1366.

manufacturers alike have freely copied designs first originated here or, more frequently in the immediate postwar era, in Europe.

## ii. Unrestrained Copying Following the Fall of the Guilds

### A. Fashion's Low-IP Equilibrium

In the more than six decades since *Fashion Originators' Guild*, copying has continued apace. Fashion industry firms have occasionally lobbied for expanded legal protections for their designs. Yet these efforts are notable mostly for their feebleness, and the IP framework governing fashion designs is today essentially the same as that existing at the time of the Fashion Originators' Guild. Set against the trend (especially in the last quarter-century) of dramatically expanding intellectual property protections, the copying free-for-all that obtains in the fashion world looks increasingly peculiar. Today, the fashion industry operates in what we term a *low-IP equilibrium*. When we use that phrase, we mean that the three core forms of IP law – copyright, trademark, and patent – provide only very limited protection for fashion designs, and yet this low level of legal protection is politically stable. While occasionally efforts have commenced to alter the legal regime governing design copying, the regime has persisted unchanged for over six decades. We briefly consider each area of IP protection in turn:

**Copyright.** The U.S. guilds were a cooperative, extra-legal system that controlled copying so that creators could appropriate the value of their creations. The industry resorted to an extra-legal system because copyright law did not protect most clothing designs. As a doctrinal matter, this lack of protection does not arise from any specific exemption of fashion design from copyright's domain. (We discuss this issue in much greater depth below). Rather, the lack of protection formally flows from a more general point of copyright doctrine: namely, the rule largely denying copyright protection to the class of "useful articles" – i.e., goods, like apparel (or furniture or lighting fixtures), in which creative expression is compounded with practical utility.

What this means is that a two-dimensional sketch of a fashion design is protected

by copyright as a pictorial work. The three-dimensional garment produced from that sketch, however, is ordinarily not separately protected, and copying that uses the garment as a model typically escapes copyright liability. Why? The doctrinal answer is that the garment is a useful article, and copyright law applies only when the article's expressive component is "separable" from its useful function.<sup>28</sup> For example, a jeweled appliqué stitched onto a sweater may be a separable (and thus protectable) design, because the appliqué is *physically* separable from the garment, and it is also *conceptually* separable in the sense that the appliqué does not contribute to the garment's utility. But very few fashion designs are separable in this way; the expressive elements in most garments are not "bolted on" in the manner of an appliqué, but are instilled into the form of the garment itself – e.g., in the "cut" of a sleeve, the shape of a pants leg, and the myriad design variations that give rise to the variety of fashions for both men and women. So for nearly all apparel the copyright laws are inapplicable, and as a consequence the vast majority of the fashion industry's products exist in a copyright-free zone. This is true both for slavish copies and for looser copies that simply "reference" an existing item or pay it homage.

**Trademark/Trade Dress.** Trademarks help to maintain a prestige premium for particular brands, and can be quite valuable to apparel and accessory firms.<sup>29</sup> Fashion

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<sup>28</sup> See, e.g., *Galiano v. Harrah's Operating Co., Inc.*, 416 F.3d 411, 422 (5<sup>th</sup> Cir. 2005) (casino uniforms unprotected; expressive element not marketable separately from utilitarian function); *Poe v. Missing Persons*, 745 F.2d 1238 (9<sup>th</sup> Cir. 1984) (copyright found in "three dimensional work of art in primarily flexible clear-vinyl and covered rock media" shaped like a bathing suit; evidence suggested article "was an artwork and not a useful article of clothing.").

<sup>29</sup> Fashion brands are heavily licensed, and excessive licensing can so tarnish the brand that its status is lost. But many firms put significant effort into ensuring that their trademarks are neither diluted nor counterfeited. We use dilution here in a general sense to mean "watered-down" through excessive exposure and licensing, rather than in its doctrinal mode. Trademark counterfeiting is discussed, and to some degree blurred with design piracy, in Barnett, *supra* n.\_\_\_\_. Trademark infringement cases are common in the fashion industry, but courts carefully distinguish trademark from design piracy claims. Barnett gives the example of *People v. Rosenthal*, 2003 NY Slip Op 51738(U) (Criminal Ct. NY County, Mar. 4, 2003, J. Cooper), noting that "while it is perfectly legal to sell merchandise that copies the design and style of a product often referred to as 'knockoffs,' it is against the law to sell goods that bear a counterfeit trademark." Barnett, *supra* n.\_\_\_\_, at n.25. We are skeptical of Barnett's claim that copyists produce easily recognizable and "generally imperfect" imitations. *Id.* at 1385. As an article in the Wall Street Journal

industry firms invest heavily in policing unauthorized use of their marks.<sup>30</sup> Many fashion goods sold by street vendors are counterfeits that plainly infringe trademarks. Some, however, copy designs rather than trademarks. And all goods sold by retail copyists like H & M, or by copyist designers working in major fashion houses, are not counterfeits in terms of trademark. These goods are instead sold under another trademark but freely appropriate the *design* elements of a fashion originator.

It is this category of goods – design copies – that is our focus here. The utility of trademark law in protecting fashion designs, as distinct from fashion brands, is quite limited. Occasionally a fashion design will visibly integrate a trademark to an extent that

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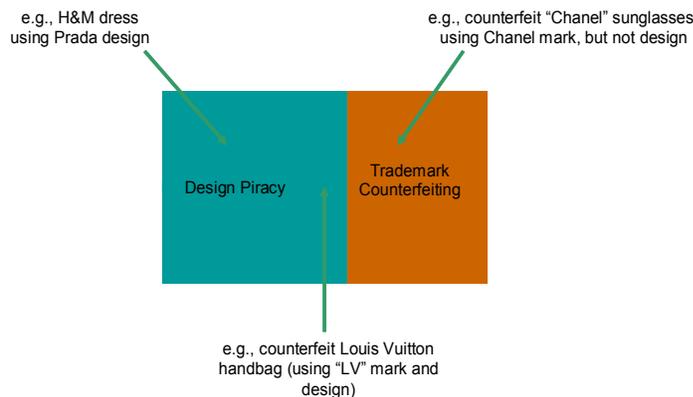
recently described, the quality of knocks-off often is extremely good and distinguishing imitations from originals can be difficult. Counterfeit for Christmas: Gift Givers Tap New Source As Travel to China Eases, Knockoff Quality Improves, *Wall Street Journal*, Dec 9, 2005, B1. In any event, it is clear, as we describe in the note below, that major labels put significant effort into trademark policing but almost none into policing design copying.

<sup>30</sup> The lengths to which firms will go to prevent unauthorized use of their marks is illustrated by Dolce & Gabbana's anti-counterfeiting policy:

Starting out from the 1997-1998 Autumn/Winter season [Dolce & Gabbana] introduced an "anti-imitation" system using made up of both visible and invisible elements. The aim of this system is to protect the articles of some of the lines which are to a greater degree the object of numerous attempts at imitations on the part of counterfeiters and, on the part of Dolce & Gabbana S.p.A., to safeguard its clientele. The by now consolidated system of anti-imitation principally consists of the use of a safety hologram (in the foreground showing an "&", together with a series of micro-texts which reproduce the trademark): the graphic elements were ideated by Dolce & Gabbana whereas the hologram is produced and guaranteed by the Istituto Poligrafico e Zecca della Stato (the Italian State Printing Works and Mint). The anti-imitation elements used by the "D&G Dolce & Gabbana" line which make up the system consist of a certificate of authenticity bearing the hologram, a woven label placed inside every article with the trademark with the same hologram heat-impressed on it, a safety seal whose braiding contains an identification thread that is reactive to ultra-violet rays and a woven label with the Company's logo incorporating the same identification thread. Furthermore, Dolce & Gabbana S.p.A. has stipulated agreements with the Customs Authorities of the most important countries throughout the world with the intention of monitoring the articles bearing its trademark. Dolce & Gabbana has also provided these Authorities with anti-imitation kits which reproduce and elucidate the elements mentioned above, divided by way of each line forming part of the anti-imitation system, with the aim of individuating and blocking the transit of counterfeited goods bearing our trademark by the same customs personnel.

See [http://eng.dolcegabbana.it/corporate.asp?page=Brand\\_DolGab](http://eng.dolcegabbana.it/corporate.asp?page=Brand_DolGab).

the mark becomes an element of the design. Burberry’s distinctive plaid is trademarked, for example, and many Burberry’s garments and accessories incorporate this plaid into the design. Occasionally—and some would argue increasingly—clothing and accessory designs prominently incorporate a trademarked logo on the outside of the garment; think, for example, of a Louis Vuitton handbag covered with a repeating pattern of the brand’s well-known “LV” mark. For these goods, the logo is part of the design, and thus trademark provides significant protection against design copying. But for the vast majority of apparel goods, the trademarks are either inside the garment or subtly displayed on small portions such as buttons. Thus for most garments, trademarks do not block design copying. Figure B clarifies the distinction between design copying and trademark counterfeiting.



In addition to protection of source-defining marks, trademark law also protects “trade dress,” a concept originally limited to a product’s packaging, but which, as the

Supreme Court has noted, “has been expanded by many courts of appeals to encompass the design of a product.”<sup>31</sup> Some courts have gone so far as to hold that “[t]rade dress involves the total image of a product . . . such as size, shape, color or color combinations, texture, graphics or even particular sales techniques.”<sup>32</sup>

Many of the attributes constitutive of trade dress are, of course, key to the appeal of clothing designs, and trade dress might therefore play an increasingly significant role in the proprietization of designs. The doctrine has, however, not yet emerged as a substitute for copyright, in part because trade dress protection is, like copyright, limited to non-functional design elements.<sup>33</sup> Perhaps more importantly, trade dress is limited to design elements that are “source designating”, rather than merely ornamental.<sup>34</sup> In *Knitwaves v. Lollytogs*, a 1995 case dealing with appliqué designs on sweaters, the 2<sup>nd</sup> Circuit noted that few clothing design elements are protected under the “source designation” standard.<sup>35</sup> More recently, the Supreme Court further restricted the potential application of trade dress law in *Wal-Mart Stores, Inc. v. Samara Bros., Inc.* In a case involving Wal-Mart knock-offs of designer children’s clothing, the Court held that the design of products (including fashion items) “almost invariably serves purposes other

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<sup>31</sup> *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 209 (2000).

<sup>32</sup> *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 980 (11<sup>th</sup> Cir. 1983).

<sup>33</sup> Lanham Act, Sec. 2(e)(5). The non-functionality requirement for trade dress may be somewhat lower than obtains in copyright law, because most courts have held that functional design elements may be protected as trade dress if they are part of an assemblage of trade dress elements that contains significant non-functional items. See *Fuddrucker, Inc. v. Doc’s B.R. Others, Inc.*, 826 F.2d 837, 842 (9<sup>th</sup> Cir. 1987) (“[O]ur inquiry is not addressed to whether individual elements of the trade dress fall within the definition of functional, but to whether the whole collection of elements taken together are functional.”).

<sup>34</sup> See, e.g., *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3d 996 (2d Cir. 1995) (aesthetic features of girls’ sweaters that were not source designating not part of protectible trade dress). See also *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 213 (2000) (product design cannot be “inherently distinctive”, and “almost invariably serves purposes other than source designation”).

<sup>35</sup> “As *Knitwaves*’ objective in the two sweater designs was primarily aesthetic, the designs were not primarily intended as source identification.” *Id.* at 998.

than source identification.”<sup>36</sup> As a result, a plaintiff seeking trade dress protection for any product design (including a fashion design) is obliged to show that the design is one that has acquired “secondary meaning” under the trademark law.<sup>37</sup> To meet this requirement, a manufacturer must show that, “in the minds of the public, the *primary significance* of a product feature or term is to identify the source of the product rather than the product itself.”<sup>38</sup>

For clothing designs, such a standard will rarely be met. The court’s observation in *Knitwaves* seems correct: consumers may admire a clothing design, but they seldom appreciate that particular design elements are linked to a brand. Rarely does not, of course, mean never: fashion savvy consumers might, for example, associate with Chanel a group of trade dress elements consisting of contrasting-color braided piping along the lapels of a collarless, four-pocket woman’s jacket –signature elements of Chanel’s iconic jackets. But few fashion design elements are likely to stimulate the degree of source recognition sufficient to undergird trade dress protection. Consequently, for most clothing designs trade dress protection is unavailable.

**Patent.** Protection for novel fashion designs is available, at least in theory, under the patent laws, which include a “design patent” provision offering a 14-year term of protection for “new, original, and ornamental design[s] for an article of manufacture.”<sup>39</sup> But shelter within the design patent provisions is, for two principal reasons, unavailable for virtually all fashion designs.

The first reason is doctrinal. Unlike copyright, which extends to all “original” expression (i.e., all expression not copied in its entirety from others and that contains a

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<sup>36</sup> Samara, 529 U.S. at 213.

<sup>37</sup> Id. at 216.

<sup>38</sup> *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 851 n.11 (1982) (emphasis supplied).

<sup>39</sup> 35 U.S.C. 171.

modicum of creativity), design patents are available only for designs that are truly “new”, and does not extend to designs that are merely re-workings of previously-existing designs.<sup>40</sup> Because so many apparel designs are re-workings<sup>41</sup> and are not “new” in the sense that the patent law requires, most will not qualify for design patent protection.

There is, moreover, a second and more substantial limitation to the relevance of design patent as a form of protection for fashion designs. The process of preparing a patent application is expensive, the waiting period lengthy (more than 18 months, on average, for design patents), and the prospects of protection uncertain (the United States Patent and Trademark Office rejects roughly half of all applications for design patents). Given the short shelf-life of many fashion designs, the design patent is simply too slow and uncertain to be relevant.

## **B. Some Examples of Fashion Design Copying**

Fashion design copying is ubiquitous. Perhaps most obviously, designs are frequently copied by retailers such as H & M, which offers cheap facsimiles of expensive ready-to-wear in its over 1000 stores, including in the U.S.<sup>42</sup> But copying is not limited to large retailers aping elite designers. Equally common is the practice of elite designers

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<sup>40</sup> 35 U.S.C. 102. See also *In re Bartlett*, 300 F.2d 942, 133 USPQ 204 (CCPA 1962) (“The degree of difference required to establish novelty occurs when the average observer takes the new design for a different, and not a modified already-existing, design.”).

<sup>41</sup> We recognize that this pattern of “remix” innovation may be endogenous; in other words, if not for the practical barriers sharply limiting the availability of design patents, it is at least theoretically possible that the fashion industry would engage less in the endless reworking of existing designs and turn attention toward designs that would meet patent’s novelty requirement. We discuss this further below. We have no way to test this counter-factual, but we doubt that, even if the practical barriers to design patent protection were eased, the industry’s design output would change much. As our discussion of anchoring suggests, see Part II, \_\_\_\_\_, the industry’s design output reflects consumers’ deep desire not for “novelty”, but for limited conformity to the current design mode.

<sup>42</sup> H & M 2004 Annual Report, at [www.hm.com](http://www.hm.com). See also Eric Wilson, *McFashion? Bargains Sell*, *New York Times* (Apr. 24, 2005); Amy Kover, *That Looks Familiar. Didn’t I Design It?*, *New York Times*, (Jun. 19, 2005). H & M has begun using famous or semi-famous designers to design their collections as well, such as Stella McCartney. See <http://www.designerhistory.com/historyofashion/mccartney.html>

and design firms copying one another, which is illustrated in Figures C, D and E. These photographs are taken from the magazine *Marie Claire*'s regular feature titled "Splurge or Steal". It is evident from these pairings that one designer is copying. Which designer is the originator and which the copyist is of little moment, but at least for Figure E, the identity of the copyist is no mystery. The "steal" in Figure E is a copy by Allen B. Schwartz, who, in the biography offered by his own company, states that he is "revered and applauded for the extraordinary job he does of bringing runway trends to the sales racks in record time."<sup>43</sup> These "runway trends," of course, are the works of other designers.

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<sup>43</sup> See biography, Allen B. Schwartz, ABS Website, available at <http://www.absstyle.com/allen.asp> See also Sarah Childress, Proms Go Hollywood, MSNBC.com (May 18, 2005), available at <http://www.msnbc.msn.com/id/7888491/site/newsweek/?GT1=6542>, (discussing Schwartz's history of design copying).

STYLING  
SPLURGE



**SPLURGE:**  
Brocade jacket,  
\$2390, Luisa Beccaria;  
leather sandals, \$205,  
Stuart Weitzman.  
**STEAL:**  
Jacquard jacket,  
\$398, Perry Ellis  
Women's; dress, \$310,  
Theory; sandals,  
\$49, Colin Stuart for  
Victoria's Secret.







## STEAL

**SPLURGE:**  
Silk trenchcoat, \$1565,  
Behnaz Sarafpour;  
stretch jeans, \$350,  
Escada; slingbacks,  
\$205, Stuart  
Weitzman; bag, \$950,  
Celine; white-gold  
hoops, \$495, Dean  
Harris; watch, \$795,  
Christian Dior.

**STEAL:**  
Linen trenchcoat,  
\$159, Jones New York  
Collection; jeans,  
\$139, Bebe; slingbacks,  
\$49, Collin Stuart  
for Victoria's Secret;  
hoops, \$6.50,  
Claire's; watch, \$75,  
DKNY Time.

shops

**SPLURGE:**  
Cardigan, \$187, Shoshanna; silk dress, \$1000, Jeffrey Chow; sandals, \$205, Stuart Weitzman; bracelet, \$185, R.J. Graziano.  
**STEAL:**  
Cardigan, \$44, Gap; dress, \$245, A.B.S. by Allen Schwartz; sandals, \$49, Colin Stuart for Victoria's Secret. For information, see Shopping Directory. Hair: Bill Westmoreland for artandcommerce.com. Makeup: Matin for artistsbytimothypriano.com. Manicure: Tamika for artistsbytimothypriano.com. Models: Karolina & Line. Production: Ziggy Lenn/House Productions. Shot on location at the Shops at Columbus Circle, Time Warner Center, NYC; guest services: (212) 823-6300.

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PHOTOGRAPH BY COLLEEN CIRCLE/ENTREPRENEUR CALL (212) 823-6300



Copying typically occurs in the same season or year that the original garment appears. But the arc of the “driving shoe” illustrates how fashion design copying can sometimes occur with a lag. In 1978, Diego Della Valle of the J.P. Tod firm marketed a shoe he called the “gommino” – a leather moccasin with a sole made of rubber “pebbles”. The Tod shoe is pictured in Figure F.



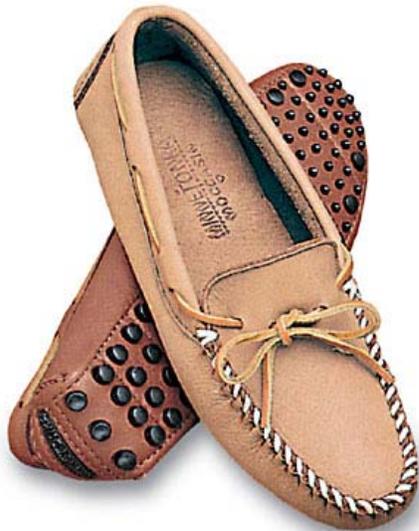
Della Valle (J.P. Tod)

The gommino found a niche audience in the early ‘80s. That changed, however, in the mid 00’s, when dozens of shoe designers began marketing their own versions. A few examples of the derivative driving shoes are shown in Figure G, below:

Spring 2005 – driving shoe variations for menswear



Bacco Bucci



Minnetonka



Ecco



E.T. Wright



### Ralph Lauren

The driving shoe's trajectory is unusual. Most fashion designs do not endure; some barely survive a season. Given the evanescence of many trends, fashion copying is a threat to most creators only if copies are produced and distributed quickly. Yet increasingly they are. Digital photography and design platforms, the Internet, global outsourcing of manufacture, more flexible manufacturing technologies, and lower textile tariffs have significantly accelerated the pace of copying. Copies are now produced and in stores as soon as it becomes clear a design has become hot – and sometimes before.

The result is remarkably pervasive appropriation of designs, with marketing of copies and derivatives at every level of the apparel marketplace. Viewed from the perspective of the music or motion picture industries, we know what to call this – piracy. And of course piracy is a principal concern of content owners – this is clear to anyone who has followed the recording industry's battle against online file-trading over peer-to-peer networks like Grokster,<sup>44</sup> or who views the websites of the industries' trade

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<sup>44</sup> See, e.g., *Metro-Goldwyn-Mayer v. Grokster*, 545 U.S. \_\_\_\_ (2005); "New RIAA Lawsuits Target Campus Users," <http://www.pcmag.com/article2/0,1895,1866777,00.asp>; Jesse Hiestand, "MPAA

associations, the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA), both of which feature information about and links to anti-piracy initiatives prominently on their front pages.<sup>45</sup>

Unlike the music and motion picture industries, the fashion industry has not embarked on any substantial anti-piracy initiative. Recently the principal trade association for American fashion designers, the Council of Fashion Designers of America (CFDA),<sup>46</sup> has participated in the drafting of a bill, H.R. 5055, that would extend protection to fashion designs.<sup>47</sup> As of this writing, the bill has been referred to committee. [MORE TO COME]

Even if legislation protecting fashion design is enacted in the next few years, there is still a striking sixty year period from the fall of the fashion guilds in which IP law did not protect fashion designs, despite many opportunities and initiatives to alter the law. This sixty year period encompassed major changes in copyright law, changes that significantly extended the reach and power of IP protection. Against this backdrop, the relative absence of concern about IP among fashion industry firms is remarkable. And this diffidence about copying reinforces what the foregoing illustrations of design copying suggest and what many within the industry have observed: that the freedom to copy – euphemistically referred to by designers as “referencing” or “homage” – is largely taken for granted at all levels of the fashion world.<sup>48</sup> In the words of Tom Ford, former

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Launches Legal Offensive Against Online Pirates,”  
[http://www.hollywoodreporter.com/thr/article\\_display.jsp?vnu\\_content\\_id=1000706666](http://www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=1000706666).

<sup>45</sup> See <<http://www.riaa.com/default.asp>> (visited on Oct. 10, 2005); <<http://www.mpaa.org/home.htm>> (visited on Oct. 10, 2005).

<sup>46</sup> See <<http://www.cfda.com>> (visited on Oct. 10, 2005).

<sup>47</sup> See H.R. 5055 (introduced 109<sup>th</sup> Cong., 2d Sess., Mar. 30, 2006). For Congressional Research Service summary of H.R. 5055, see <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR05055:@@D&summ2=m&>.

<sup>48</sup> Cathy Horyn, *Is Copying Really Part of the Creative Process?*, *New York Times* (Apr. 9, 2002).

creative director for Gucci, “appropriation and sampling in every field has been rampant.”<sup>49</sup>

This is not to deny that fashion designers sometimes complain about specific instances of design copying. On rare occasions, they even sue one another. In 1994 Yves Saint Laurent famously sued Ralph Lauren in a French commercial court for the “point by point” copying of a YSL dress design.<sup>50</sup> YSL's successful suit took place in Europe, where IP laws are more protective of fashion designs, a topic to which we return below.<sup>51</sup> But this famous dispute aside, what is most striking about design copying is how remarkably *little* attention it gets from the industry, either in Europe or in the U.S. The YSL-Lauren lawsuit is in many ways the exception that proves the rule, and the rule is that fashion designs are “free as the air to common use.”<sup>52</sup>

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<sup>49</sup> Cara Mia DiMassa, *Designers Pull New Styles Out of the Past*, Los Angeles Times (Jan. 30, 2005).

<sup>50</sup> *Societe Yves Saint Laurent Couture S.A. v. Societe Louis Dreyfus Retail Management S.A.*, [1994] E.C.C. 512 (Trib. Comm. (Paris)) (“YSL”). Interestingly, the plaintiff’s litigation position in YSL is illustrative of the significant measure of legitimacy copying enjoys in the fashion industry, relative to other content industries. According to St. Laurent: “[I]t is one thing to ‘take inspiration’ from another designer, but it is quite another to steal a model point by point, as Ralph Lauren has done.” *Id.* at 519, 520. See also Agins, *supra* n. \_\_\_\_ (quoting a NY-based fashion consultant as saying that “Yves Saint Laurent has blown the whistle on the dirtiest secret in the fashion industry. None of them are above copying each other when they think they can make a fast buck.”). Terry Agins elsewhere notes that YSL was himself a copyist, having been found guilty of copying by a French court in 1985. Terry Agins, *The End of Fashion* (Quill, 2000) at 43.

<sup>51</sup> See II. \_\_\_\_, *infra*.

<sup>52</sup> See *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Justice Brandeis dissenting) (“[T]he noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – become, after voluntary communication to others, free as the air to common use . . .” and should have “the attribute of property” only “in certain classes of cases where public policy has seemed to demand it.”).

## II. THE PIRACY PARADOX

As fashion spreads, it gradually goes to its doom.<sup>53</sup>

Georg Simmel, 1904.

The orthodox view of IP law holds that piracy is a serious, even fatal threat to the incentive to engage in creative labor. And the film, music, software and publishing industries have responded to this threat as the orthodox justification for IP rights would counsel: they have demanded increased protection under the law. In Congress, these industries have sought broader and more durable IP protections through new laws such as the Digital Millennium Copyright Act and the Sonny Bono Copyright Term Extension Act. In the courts, they have aggressively fought alleged pirates and their enablers.<sup>54</sup> And at the international level they have pushed the executive branch to negotiate strict new bilateral IP treaties, as well as the landmark 1994 Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs), which ties signatories' enforcement of minimum IP standards to the World Trade Organization's powerful dispute resolution mechanisms.<sup>55</sup>

The fashion industry has done none of these things. Of particular interest for our purposes here, fashion firms and designers have obtained, at least in the U.S., neither expanded copyright protection applicable to apparel designs nor *sui generis* statutory

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<sup>53</sup> Georg Simmel, Fashion 547 (1904).

<sup>54</sup> See, e.g., *Metro-Goldwyn-Mayer v. Grokster*, 545 U.S. \_\_\_\_ (2005); "New RIAA Lawsuits Target Campus Users," <http://www.pcmag.com/article2/0,1895,1866777,00.asp>; Jesse Hiestand, "MPAA Launches Legal Offensive Against Online Pirates," [http://www.hollywoodreporter.com/thr/article\\_display.jsp?vnu\\_content\\_id=1000706666](http://www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=1000706666)

<sup>55</sup> Rochelle Dreyfuss and Andreas Lowenfeld, Two Achievements of the Uruguay Round: Puts Trips and Dispute Settlement Together, 37, Va. J. Int'l L. (1997). Compliance with the TRIPs agreement is mandatory for all WTO members. It sets a floor of "minimum standards" for IP protection in member states, and establishes procedures for enforcement of members' obligations. See generally [http://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm) for an overview.

protection. Why has the industry failed to secure U.S. copyright or quasi-copyright protection for its designs, despite what all observers agree is rampant appropriation?

The answer is not doctrinal. Later in this Part, we show that no substantial doctrinal barrier prevents copyright's extension to fashion designs.<sup>56</sup> So if the law could expand to cover fashion design, why hasn't it? This Article seeks to explain why fashion's low-IP rule persists. In other words, what has made the regime of free appropriation a stable equilibrium, one that relevant actors have failed to overturn via the political process in the 65 years since the fall of the Fashion Originators' Guild? The orthodox account of IP suggests that free appropriation ought to drive out innovation and deter investment. Yet the fashion industry continues to innovate and attract investment despite the absence of legal protection for its designs. And historically it has shown surprisingly little interest in obtaining protection. We advance two interrelated theories that we believe are foundational to the continuing viability of fashion's low-IP equilibrium, both of which relate to the economics of fashion. In doing so we argue that the lack of design protection in fashion is not especially harmful to fashion innovators, and hence they are not incentivized to change it. Indeed, we claim that this low-IP system may paradoxically serve the industry's interests better than a high-IP system.

#### **a. Induced Obsolescence**

Our first argument begins with the special nature of clothing as a status-conferring good. Most forms of apparel above the commodity category (and even some apparel within that lowest-level category) function as what economists call "positional goods." These are goods whose value is closely tied to the perception that they are valued by others. The *Economist* helpfully defines positional goods as:

Things that the Joneses buy. Some things are bought for their intrinsic usefulness, for instance, a hammer or a washing machine. Positional goods

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<sup>56</sup> See II. \_\_\_, *infra*.

are bought because of what they say about the person who buys them. They are a way for a person to establish or signal their status relative to people who do not own them: fast cars, holidays in the most fashionable resorts, clothes from trendy designers.<sup>57</sup>

Positional goods purchases, consequently, are interdependent: what we buy is partially a function of what others buy. Put another way, the value of a positional good arises in part from social context.

The positionality of a particular good is often two-sided: its desirability may rise as some possess it, but then subsequently fall as more possess it. Take the examples used in the quote directly above. A particular fast car is most desirable when enough people possess it to signal that it is a desired object, but the value of that car often diminishes if every person on your block owns one. Nothing about the car itself has changed, except for its ability to place its owner among the elite, and to separate her from the crowd. Similarly, part of the appeal of a “fashionable” resort is that only a few people know about it, or are able to afford it. For these goods, the value of (relative) exclusivity may be a large part of the goods’ total appeal.<sup>58</sup>

Not all apparel goods are positional, but many are, and that positionality is often two-sided. Particular clothing styles and brands confer prestige. Consumers may value a particular dress or handbag from Gucci or Prada in part because fashionable people have

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<sup>57</sup> Economics A-Z at [www.economist.com](http://www.economist.com), “positional goods.” For more elaborate treatments of contemporary consumer behavior with regard to status-conferring goods, see Juliet Schor, *The Overspent American: Why We Want What We Don’t Need* (1999), and Robert Frank, *Luxury Fever: Why Money Fails to Satisfy in An Era of Excess* (1999). Frank portrays much consumer purchasing as an arms race, in which each new purchase spurs others to engage in similar purchasing, with no gain in status since status is inherently relational. Barnett, *supra*, focuses on this literature to create a three-tiered model of utility: snob utility, aspirational utility, and bandwagon utility. Barnett, *supra*, *passim*.

<sup>58</sup> In this respect two-sided positional goods are very different from those goods subject to positive externalities and network effects. Goods like fax machines or computer operating systems are continually more valuable as they are more widely used. The rate at which these goods increase in value may slow past a certain threshold of distribution, but there is no inflection point at which the good begins to decline in value as it is more widely spread.

it but unfashionable ones do not. The dress or handbag is valued so long as it enables its wearer to stand out from the masses but fit in with her particular crowd. As those styles diffuse to a broader clientele, frequently that prestige diminishes for the early adopters. This observation is not new. Jean Cocteau tapped into this dynamic of obsolescing attractiveness when he opined that “[a]rt produces ugly things which frequently become more beautiful with time. Fashion, on the other hand, produces beautiful things which always become ugly with time.”<sup>59</sup> Even earlier, sociologist Georg Simmel noted the same process: “As fashion spreads, it gradually goes to its doom. The distinctiveness which in the early stages of a set fashion assures for it a certain distribution is destroyed as the fashion spreads, and as this element wanes, the fashion also is bound to die.”<sup>60</sup> Perhaps Shakespeare put it most succinctly: “The fashion wears out more apparel than the man.”<sup>61</sup>

This process of diffusion leading to dissipation of (social) value occurs for at least two reasons. First, it is possible that diffusion of cheap, obviously inferior copies may tarnish by association the original article – although whether originals are in fact “tarnished” by copies is an empirical question on which there is little research, and indeed one recent commentator has argued that such low-grade copies actually signal the desirability of the original, thus *enhancing* its value.<sup>62</sup> Second (and, in our view, much more importantly), for the class of fashion early-adopters the mere fact that a design is widely diffused is enough, in most cases, to diminish its value. It can no longer signify status if it widely adopted. To even a casual follower of fashion, the key point is obvious: what is initially chic can rapidly become tacky as it diffuses into the broader public, and for true fashion junkies, nothing is less attractive than last year’s hot item.

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<sup>59</sup> New York World Telegram & Sun (Aug. 21, 1960).

<sup>60</sup> Simmel, *supra*.

<sup>61</sup> Conrade to Borachio, *Much Ado About Nothing*

<sup>62</sup> Barnett, *supra*, at \_\_\_\_.

A recent example of the quick ascent and descent of a fashion item is the Ugg, a sheepskin boot originating in Australia and sold to both men and women. An Ugg boot is shown in Figure H:



Ugg boots were a must-have fashion item for women in 2003 and 2004. The style was widely copied and quickly gained wide distribution, even among men.<sup>63</sup> But by August, 2004, writers were calling the Ugg boot a “human rights violation”<sup>64</sup> and urging readers to give them up. By early 2005, the Ugg trend was apparently over – at least among the cognoscenti:

I read in US Weekly recently that Demi Moore had walked into a hip store wearing Uggs and was laughed at by the workers behind the counter who couldn't believe she didn't know that she was hopelessly out of date. When the people who really have their fingers on the pulse of fashion, the retail workers, think you're fashion road kill, you have to accept it. The trend is over. Hooray!<sup>65</sup>

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<sup>63</sup> See Lorrie Grant, UGG Boots a Fashion Kick, USA Today (Dec. 10, 2003), available at [http://www.usatoday.com/money/industries/retail/2003-12-10-ugg\\_x.htm](http://www.usatoday.com/money/industries/retail/2003-12-10-ugg_x.htm).

<sup>64</sup> Defamer, Ugg Poncho, The New Ugg Evil (Aug. 9, 2004), available at <http://www.defamer.com/hollywood/culture/ugg-poncho-the-new-ugg-evil-019192.php>.

<sup>65</sup> The Budget Fashionista, Alyssa Wodtke Gives Us Her Thoughts on the Demise of the Ugg (Jan. 26, 2005), available at <http://www.thebudgetfashionista.com/archives/000540.php>. See also Tad Friend, “Letter from California: the Pursuit of Happiness”, New Yorker (Jan. 23 and 30, 2006) (discussing a police search for actress Lindsay Lohan following a car crash in which the actress was involved: “Dunn panned down Robertson toward the Ivy. ‘Problem is, every girl on the street kind of fits the profile. How’s this?’

The product cycle of Uggs illustrates the perils of positionality: what goes up eventually comes down. Against this background, the fashion industry's low-IP regime is, we argue, paradoxically advantageous for many players. IP rules providing for free appropriation of fashion designs accelerate the diffusion of designs and styles. As a design is copied by others (often at lower price points) and used in derivative works, it becomes more widely purchased. Past a certain inflection point, the diffusion of the design erodes its positional value, and the fashion item becomes anathema to the fashion-conscious. This drives status-seekers to new designs in an effort to distinguish their apparel choices from those of the masses. The early adopters move to a new mode; those new designs become fashionable and are copied and diffuse outside the early-adopter group, and the process begins again.

The fashion cycle itself is familiar. What is less commonly appreciated is the role of IP law in fostering the cycle. The absence of protection for creative designs speeds the process of diffusion by allowing copying to occur without legal sanction. This in turn speeds up the cycle. We call this process *induced obsolescence*. If copying were illegal the fashion cycle would occur very slowly, if at all. Fashion's legal regime of free design appropriation speeds diffusion and induces more rapid obsolescence of fashion designs. The fashion cycle is driven faster, in other words, by widespread design copying, because copying erodes the positional qualities of fashion goods. Designers in turn respond to this obsolescence with new designs. In short, piracy paradoxically benefits designers by inducing more rapid turnover and additional sales.

Free appropriation of clothing designs contributes to more rapid obsolescence of designs in at least two broad ways. First, copying often results in the marketing of less expensive versions, thus pricing-in consumers who otherwise would not be able to consume the design. What was elite quickly becomes mass. Trademarks can help

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He zoomed in on a Lohanish figure in dark glasses. 'She's wearing Uggs [the station manager says], those are so last year, couldn't be her.'").

distinguish the original from the various copies, and thus distinguish elites from the masses. But as noted above, in the vast majority of cases the mark is not visible unless one looks *inside* the clothes. Only occasionally do trademarks appear prominently on the outside of clothing, especially with regard to clothing outside the commodity category. In these cases, a visible mark helps distinguish copy from original and blunts some of the effects of copying on the diffusion of innovative designs. (This may help explain what some believe is an increase in visible trademarks on apparel.) For the majority of items, however, the trademark is not visible to others, rendering the original and the copy strikingly similar.

In arguing that trademark law alone does not inhibit copying of designs we do not wish to suggest that trademarks are unimportant. Even in a competitive environment that includes substantial freedom to copy, particular firms are known, within the industry and by knowledgeable consumers, as design innovators. The Chanel firm and its head designer Karl Lagerfeld, for example, have originated many influential styles of women's clothing. Because of the firm's reputation, and the resultant strength of its mark, Chanel is able to charge very high prices for apparel, even for apparel (such as its signature women's jacket) that is widely copied by other firms. What Chanel is not able to do, however, is establish itself as an exclusive purveyor of its own designs – an option it would have if U.S. copyright law protected Chanel's designs as well as its trademarks.

As in other industries, the significance of design copying turns somewhat on the closeness of the copying. If design copies were readily discernable from originals by the casual observer the status premium conferred by the original design would in large part remain.<sup>66</sup> Those who splurged might well disdain those who “steal”--though in today's

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<sup>66</sup> And perhaps, would be enhanced because consumption of the cheaper and visibly inferior copy would help signal to consumers able to afford the expensive original that the original design is particularly attractive. Barnett, *supra*, relies heavily on this assumption in his analysis of knock-offs. We are unsure about the enhancement effect but it is an empirical question. We not only do not employ this assumption, we stress a fundamentally different aspect of fashion—the desire for the new. For Barnett, “the introduction of copies, provided they are visibly imperfect, may increase the snob premium that elite consumers are willing to pay for a luxury fashion good. Second, the introduction of copies may lead non-elite consumers

consumer environment, where even the wealthy shop at Target, that is a decreasingly safe assumption. But it is often quite difficult to distinguish copies from originals – and sometimes to determine which version actually *is* the original. As the examples shown in Part I demonstrate, many copies are not visibly inferior compared with the originals, at least not without very close inspection.

Of course, many “copies” are not point-by-point reproductions at all, but instead new garments that appropriate design elements from the original and re-cast them in a derivative work. This observation brings us to the second way in which copying drives induced obsolescence. A regime of free appropriation contributes to the rapid production of a large number of garments that use the original design, but that add substantial new creativity. The many variations made possible by unrestricted exploitation of derivatives – a regime precisely the opposite of the default rule under the copyright laws, which allocate to the originator the exclusive right to make or authorize derivative works – contributes to product differentiation that induces consumption by those who prefer a particular variation to the original. To the extent that derivatives remain visibly linked to the original design, they help diffuse the original design. This in turn further accelerates the process by which that design (and its derivatives) become less attractive to early adopters.<sup>67</sup>

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to adjust upward their estimate of the status benefits to be gained by acquiring the relevant good, thereby possibly translating into purchases of the original.” Barnett, *supra*. We focus not on the effects of copies on the copied good but on *new purchases*. Our primary claim is that copies, by diffusing the original design to the mass of consumers, leads early adopters to seek out new designs in order to stay ahead, or on top, of the fashion cycle. Hence copies in our model need not be visibly inferior: in fact, the better they are, the more they propel the cycle forward. And as a matter of observation, the visible difference between copies and originals is not always large and arguably declining. As the Wall Street Journal recently reported, driving the trend toward purchases of knock-offs “is the improving quality of many fake goods. As more genuine luxury goods are produced in China, more counterfeits are being manufactured nearby—often using the same technology.” WSJ, Counterfeit for Christmas, *supra* note \_\_\_\_.

<sup>67</sup> A related “first mover” argument would suggest that the head start a design originator enjoys is sufficient to achieve success in the market, even if copying later drives a process of induced obsolescence. Fashion designs come and go quickly. If fashion design originators can sell many units before copyists can produce copies, perhaps they gain the lion’s share of the revenues from a particular design before the design becomes obsolete.

This account suggests an obvious response: if copying and derivative re-working have this effect, would this not create an incentive for the originating design house to reproduce its original design and variations in garments at different price levels – thus pursuing a single-firm price discrimination strategy? In other words, if this argument is correct we should expect the originator to reproduce its *own* designs at lower price points, and to elaborate derivatives, rather than let competitors do it. In a recent article Jonathan Barnett notes this puzzle and suggests further that one might even expect innovating firms to *give away* cheaper, visibly-inferior versions of the product. Barnett argues that brand protection—the desire to maintain the exclusivity of a brand such as Gucci—stops this from occurring in the real world. Yet the question remains why the same design could not be introduced by the same firm, but under a different brand.

The answer is that firms sometimes do exactly this. They pursue a single-firm strategy via bridge lines. While some fashion insiders stress the danger of bridge lines blurring a brand’s identity and tarnishing a mark, many well-known design houses have a second line that is lower-priced, such as Armani’s Emporio Armani or Dolce &

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The first-mover argument relies for its force on an appreciable gap between first movers and copyists. There is little evidence that this gap exists. (The driving shoe example we offered above is very anomalous in this respect: in addition to being a relatively long-lasting trend, it is one where adoption by copyists took several years, but then was quite widespread). A first-mover claim may have had some explanatory power in decades past. But for at least the last ten, if not twenty, years the copying of fashion designs has been easy and fast. Well before digitization made the process of design copying almost instantaneous, ordinary photos and transcontinental air travel allowed copyists to begin work on a design copy within days of photographing or sketching the original. For this reason we are skeptical of the idea of a first-mover advantage in fashion design for any period in the past quarter-century. We are especially skeptical of it for the last decade.

One might suspect that the increasing occurrence of nearly-instantaneous copying may eventually disturb the industry’s low-IP equilibrium. Originators’ ability to recover investment may depend on there being some period, albeit quite brief, before a given design saturates the market – perhaps because this small time lag is necessary for early-adopter consumers to identify particular designs with a particular firm, thereby helping that firm build its reputation as an innovator and consequently grow the value of its brand(s). While it is too soon to tell, it may be the case that the fashion industry is moving in this direction – toward copying so rapid that it becomes more harmful and less helpful to originators. If this occurs, we would expect to see new efforts at controlling appropriation, either through enhanced use of trademark or through modification of copyright law to bring some elements of fashion design within the purview of the intellectual property system.

Gabbana's D & G. One way to understand the phenomenon of bridge lines is precisely as a strategy to achieve some measure of vertical integration – in essence to knock off one's own signature designs and price discriminate among consumers. Themes developed in the premier lines are echoed in the bridge lines, but with cheaper materials, lower prices, and design variations pitched to the particular tastes of that bridge line's constituency, which may differ from the premier line's audience in age, wealth, and other characteristics. The most prominent user of this strategy is Armani, which has up to five distinct lines, depending on how one counts. Most fashion firms, however, do not follow the Armani model. Why the Armani model—or a model in which a single firm self-copied designs at multiple price points but using different brands to reduce the risk of brand tarnishment—is not more prevalent is an interesting question for future research. But it is clear that at least some degree of self-appropriation occurs through the common practice of an (often single) bridge line.

So while we observe some self-copying, we do not see any sustained attempt by fashion firms to prevent appropriation of their original designs by *other* firms. If self-appropriation through bridge lines were an optimal strategy for a large number of fashion firms, we suspect that the current low-IP equilibrium might not long endure, for a logical corollary to a more fully elaborated single-firm strategy based on bridge lines is blocking others from appropriating one's designs. In any event, for the moment, the industry's longstanding tolerance of appropriation contributes to the rapid diffusion of original designs. Rapid diffusion leads early-adopter consumers to seek out new designs on a regular basis, which in turn leads to more copying, which fuels yet another design shift. The fashion cycle, in sum, is propelled by piracy.

We do not claim to be the first to note the cyclical nature of fashion design. But what has not been previously understood is the role of law in fostering this cycle. Until the early 20th century, most of Western society treated clothing as a durable good to be

replaced only when it wore out.<sup>68</sup> None but the wealthiest consumers could afford to move on to new things well before the old was nonfunctional. Nevertheless, for clothing produced for the elite, the cyclical nature of the good was already apparent. Thorstein Veblen, in his 1899 classic *The Theory of the Leisure Class*, noted the process of seasonal change of “conspicuously expensive” (i.e., elite) fashion:

Dress must not only be conspicuously expensive and inconvenient, it must at the same time be up to date. No explanation at all satisfactory has hitherto been offered of the phenomenon of changing fashions. The imperative requirement of dressing in the latest accredited manner, as well as the fact that this accredited fashion constantly changes from season to season, is sufficiently familiar to every one, but the theory of this flux and change has not been worked out.<sup>69</sup>

This passage highlights a dynamic that spread, during the 20th century, to the middle classes and beyond. Veblen’s explanation for shifting fashion proceeded from his “norm of conspicuous waste,” which, he claimed, “is incompatible with the requirement that dress should be beautiful or becoming.”<sup>70</sup> Accordingly, each innovation in fashion is “intrinsically ugly”, and therefore consumers are forced periodically to “take refuge in a new style,” which is itself, of course, but another species of ugliness, thus creating a “aesthetic nausea” that drives the design cycle.<sup>71</sup> While some runway fashion can indeed induce nausea, we think it is the positional nature of fashion as a status-conferring good rather than any abstract aesthetic principle that drives the fashion cycle, leading status-seekers regularly to acquire new clothing even when the old remains fully serviceable.

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<sup>68</sup> Most clothing before the early 20th century was home-made or custom-made. Ready to wear as a category first developed for men in the mid-19th century and for women a few decades later. Only by the 1920s was mass-produced clothing available to most consumers in the United States. Leslie Burns and Nancy Bryant, *The Business of Fashion* (2nd ed., Fairchild Publications, 2002) at 10-14.

<sup>69</sup> Thorstein Veblen, *The Theory of the Leisure Class* 122 (Houghton Mifflin 1973). Not coincidentally, *American Vogue* began publication in 1892. See Burns and Bryant, *supra*, at 32.

<sup>70</sup> *Id.* at 124.

<sup>71</sup> *Id.* at 125.

Our core claim is that piracy is paradoxically beneficial for the fashion industry, or at least piracy is not very harmful. We do not deny, however, that copying may, depending on the situation, cause harm to particular originators. Even when they suffer harm when their designs are copied, originators may not be strongly incentivized to break free of the low-IP equilibrium because, often, they are also copyists. The house that sets the trend one season may be following it the next, and whether a particular firm will lead or follow in any given season is likely difficult to predict in advance. Thus in the current system designers viewing their incentives *ex ante* (and thinking over the long term) are at least partially shrouded within a Rawlsian veil of ignorance.<sup>72</sup> If copying is as likely a future state as being copied, it is not clear that property rights in fashion designs are advantageous for a designer, viewed *ex ante*. And there is good reason to think that, in a world with more than two designers, one is more likely, over time, to be a copyist than to be copied. Original ideas are few, but the existence of fashion trends typically means that many actors copy some originator (or copy a copy of the originator's design). Some may originate more than others, but all engage in some copying at some point—or, as the industry prefers to call it, “referencing.” Moreover, the industry's quick design cycle and unusual degree of positionality means that firms are involved in a rapidly-repeating game, in which a firm's position as originator or copyist is never fixed for long. The result is a stable regime of free appropriation.

### **b. Anchoring**

Our second, and related, argument proceeds from the observation that if the fashion industry is to successfully maintain a cycle of induced obsolescence by introducing one or more new styles each season, it must somehow ensure that consumers understand when the styles have changed. In short, to exist, trends have to be communicated as well as created. A low-IP regime helps the industry establish trends via a process we refer to as “anchoring”.

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<sup>72</sup> John Rawls, *A Theory of Justice* (Oxford, 1971).

Our model of anchoring rests on the existence of definable trends. While the industry produces a wide variety of designs at any one time, readily discernible trends nonetheless emerge and come to define a particular season's style. These trends are not chosen by committee: they evolve through an undirected process of copying, referencing, and testing of design themes via observation of rivals' designs at runway shows, communication with buyers for key retailers, and coverage and commentary in the press. Designers and critics note these trends all the time, and they often talk of the convergence of designs as a reflection of the *zeitgeist*. Like a school of fish moving first this way and then that, fashion designers follow the lead of other designers in a process that, while bewildering at times, results in the emergence of particular themes.

The important point about anchoring is that for the trendy to follow trends, they need to be able to identify them. And in practice, there is always a discernable set of major trends and a myriad of minor ones. Copying contributes substantially to this process. Widespread copying allows each season's output of designer apparel to gain some degree of design coherence. In doing so, copying helps create and accelerate trends. The very concept of a trend requires multiple actors converging on a particular theme. Copying helps to anchor the new season to a limited number of design themes – themes that are freely workable by all firms in the industry within the low-IP equilibrium. A regime of free appropriation helps emergent themes become full-blown trends; trendy consumers follow suit. Anchoring thus encourages consumption by conveying to consumers important information about the season's dominant styles: suits are slim, or roomy; skirts are tweedy, or bohemian; the hot handbag is small, rectangular, and made of white-stitched black leather, and so forth. Thus anchoring helps fashion-conscious consumers understand (1) when the mode has shifted, (2) what defines the new mode, and (3) what to buy to remain within it.

The process by which the industry converges on a particular theme(s) is worthy of its own study, but is beyond the scope of this paper. We can see the process at work, however, in the illustrations of driving shoes in Figure G. That particular style had an efflorescence in Spring and Summer 2005; at the same time, the *New York*

*Times* reported on a project by a former fashion critic for the *New Yorker* magazine honoring the 25<sup>th</sup> anniversary of the original Della Valle (Tod's) driving shoe.<sup>73</sup> In the recent Fall 2005 season, the hot fabric was said to be astrakhan, a sort of fur made from lambs (and even fetal sheep) from Central Asia; a hot shoe style was the snub-nosed high heel pump.<sup>74</sup> There is no functional explanation for the sudden relevance of these themes – i.e., no explanation related to the utility of a particular design. Rather, the process by which design themes emerge and characterize a season's output is a combination of creative intuition, testing among constituencies, and informal communication within the industry. Via this process, the fashion community converges on seasonal themes, and then fashion firms exploit them, copying from one another, spinning out derivatives and variations, diffusing the themes widely and driving them toward exhaustion. The resulting anchoring of a season's innovation around a set of discrete designs helps drive consumption by defining, in a literal sense, what is, and what is not, in style that season.

We also see this process at work within a large adjunct to the fashion industry—magazines such as *Glamour*, *Marie Claire*, and *Vogue*, and television shows such as *What Not to Wear*, all of which provide fashion advice to consumers. Their proclamations do not always take root, but they are a constant. A recent *New York Times* story describes, in the vaporous prose that characterizes fashion writing, the appearance during the Fall 2005 season of a large number of women's boot designs. The article highlights the unusual existence of *multiple* boot designs in the season:

There are 60s styles a la Nancy Sinatra; 70s styles a la Stevie Nicks; 80s styles a la Gloria Estefan; and 90s styles a la Shirley Manson. It is a

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<sup>73</sup> See Armand Limnander, *The Remix: Back to Collage*, N.Y. Times Sunday Magazine 92 (Aug. 28, 2005).

<sup>74</sup> "Snub-nosed pumps are everywhere this fall." *New York Times*, Sunday Styles, Pulse section, Sept 11, 2005, pg 3.

puzzling sight for fashion seers used to declaring that one style of boot—Midcalf! Thighhigh!—is The One For Fall.<sup>75</sup>

The writer's expectation – which the style promiscuity of the 2005 season violates – is that the industry will anchor narrowly. And there are many examples of narrow anchoring that appear in the fashion press and the fashion racks. One example from Spring/Summer 2005 is the “bohemian” skirt – a style of loosely fitted skirt featuring tiers of gathered fabric, lace inserts, and (usually) an elasticized or drawstring waist. This skirt is derivative of a style not widely worn since the 1970s. Suddenly last spring, dozens if not hundreds of versions of these skirts appeared, became one of the defining themes of the season,<sup>76</sup> and served as an anchor for a wider “bohemian look”.<sup>77</sup> Figure I shows examples of bohemian skirts from U.K. fast-fashion retailer Topshop; the photo on the right also illustrates garments that, along with the skirt, comprise the “bohemian look”:

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<sup>75</sup> David Colman, “Choices, up to your knees,” NY Times E1 Aug 25 2005.

<sup>76</sup> See Pauline Weston Thomas, *The Gypsy Boho Summer of 2005*, available at <[http://www.fashion-era.com/Trends\\_2006/9\\_fashion\\_trends\\_2006\\_boho\\_gypsy.htm](http://www.fashion-era.com/Trends_2006/9_fashion_trends_2006_boho_gypsy.htm)> (“It’s unlikely that you missed it, but in the past year eclectic ethnic has swept the nation with a phenomenal speed, reaching a peak in summer 2005 with the ultra feminine Gypsy Boho skirt. Women began to wear skirts for the first time in years. This revived 1970’s tiered ‘Hippy Skirt’ has been a worldwide success and because of the easy fit with mostly elasticated waist/drawstring and lots of hip room it is ultra comfortable. In addition this makes it very easy to manufacture with one size often adjusting to fit many.”).

<sup>77</sup> See, e.g., Judy Gordon, “If You Want to be Groovy, You Gotta Go ‘Boho’”, available at <<http://msnbc.msn.com/id/7425693/>> (“This season, Fashionistas are rhapsodic about the revival of the bohemian style.”); “Spring Fashion: Get the Bohemian Look”, available at <<http://www.kidzworld.com/site/p5553.htm>> (“If you haven’t already noticed, the bohemian look is the hottest trend of the moment. Inspired by gypsies, ethnic patterns and the ‘70s hippie scene, the boho trend is all about looking like you just threw on some clothes without thinking.”).



If the usual lifespan of trends in women’s fashion is a guide, the bohemian look for Spring/Summer 2005 is over. However, it has, by some accounts, influenced a related “Russian” or “Babushka” look for Fall 2005.<sup>78</sup> Figure J shows examples of the Russian style by Oscar de la Renta, Diane Furstenberg, Behnaz Sarafpour, Anna Sui, and Matthew Williamson.<sup>79</sup>

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<sup>78</sup> See Weston Thomas, *supra* n. \_\_\_\_ (“Yet now, with fall 2005 upon us we find the time has come to move forward. This is easily achievable with the Rich Russian Look which will take you through the transition from Boho to Babushka with ease.”).

<sup>79</sup> Harriet Mays Powell & Amy Larocca, Fall Fashion, *New York Magazine*, available at <<http://newyorkmetro.com/newyorkmetro/shopping/fashion/fall2005/11164/index.html>>.



To be sure, the styles produced by designers do not always resonate with individual consumers or the major retailers that must make decisions about purchases well before the clothes hit the racks. But it is undeniable that particular designs are identified as anchoring trends – “Midcalf boots are The One For Fall” – and that these trends wax and then wane, only to be replaced by the next set of themes. And again, the fashion industry’s low-IP environment is constitutive of this induced obsolescence/anchoring dynamic: Designers’ frequent referencing of each other’s work helps to create (and then exhaust) the dominant themes, and these themes together constitute a mode that consumers reference to guide their assessments of what is “in fashion”.

**c. Summary: The Paradoxical Effects of Low Protection**

Our stylized account of the fashion industry and the surprising persistence of its low-IP regime obviously glosses over much. The so-called “democratization of fashion” that took place in the latter half of the 20<sup>th</sup> century makes the process of modeling innovation and diffusion in the industry difficult because fashion is no longer a top-down design enterprise.<sup>80</sup> Today many trends bubble up from the street, rather than down from

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<sup>80</sup> Agins [book], *supra*.

major houses. But if there is one verity in fashion, it is that some things are hot and others are not – and the styles in vogue are constantly changing.

What matters for our argument is less *who* determines what is desirable than *how* a regime of low IP protection, by permitting extensive and free copying, enables emerging trends to develop and diffuse rapidly—and, as a result of the positionality of fashion, to die rapidly. Induced obsolescence and anchoring are thus intertwined in a process of quick design turnover. This turnover contributes to, though it does not create, a market in which consumers purchase apparel at a level well beyond that necessary simply to clothe themselves. Together, induced obsolescence and anchoring help explain why the fashion industry’s low-IP regime has been politically stable. These twin phenomena at a minimum reduce the economic harm from design copying, harm that is predicted by the standard account of IP rights. More maximally, these processes actually benefit designers and the industry as a whole. More fashion goods are consumed in a low-IP world than would be in a world of high-IP protection precisely because copying rapidly reduces the status premium conveyed by new apparel and accessory designs, which in turn requires status-seekers to renew the hunt for the new-new thing.

It is important to underscore that we do not claim that induced obsolescence and anchoring have *caused* IP protection to be low in any direct sense. Rather, our argument is more nuanced: these phenomena help explain why the *political equilibrium of low IP-protection is stable*. The existence and cyclical effect of induced obsolescence and anchoring have allowed the industry to remain successful and creative despite a regime of free appropriation. We acknowledge that many designs do not fall within any identifiable trend, and the induced obsolescence/anchoring process does not apply to every innovation produced by the fashion industry. Our point is simply that the existence of identifiable trends is itself a product of pervasive design copying, and the creation and accelerated extinction of these trends helps to sell fashion.

We also do not claim that the current regime is optimal for fashion designers – or for consumers. We recognize that the fashion industry may also be able to thrive in a

high-IP environment that offers substantial protections to originators against copying – protections analogous to those afforded to other creative industries. Since a formal high-IP regime has never existed in the fashion industry (at least in the U.S.) it is difficult to say with any certainty whether raising IP protections would raise consumer or producer welfare.<sup>81</sup> And it is possible that the structure of the fashion cycle, and the industry’s relentless remixing and reworking of older (and current) designs, is endogenous, in that industry practices derive, in part, from the existing legal regime of open appropriation of designs. To some degree this is clearly true: if fashion were treated like music or books by the law, the reworking of designs would be quite limited. But it is unlikely that the fashion cycle as a phenomenon would cease to exist under a high protection legal regime. In other words, the extant legal regime likely has some causal effect on the structure of innovation in the fashion industry, but not an overwhelming effect. The positional nature of fashion is of long-standing—long predating Veblen’s observations in the 19<sup>th</sup> century—and we doubt much could dislodge the practice of using clothing styles to signal status to others. In any event, the history of fashion shows that informal high-IP equilibria have existed. As we have described, prior to the 1940s the American industry constructed an extra-legal high-IP regime via the Fashion Originator’s Guild.<sup>82</sup> This permitted copying of European designs but not American ones. Once the Supreme Court disrupted that regime on antitrust grounds, however, extensive copying of all designs renewed. In the six decades since, in which copyright law underwent radical expansion in many areas, the legal regime for fashion has been remarkably stable. And the fashion industries in both America and abroad have thrived.

**d. EU vs. U.S. – Different Legal Rules, Similar Industry Conduct**

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<sup>81</sup> Whether consumers would be better off with less rapid change, or with more rapid change, is not clear to us, and our arguments above are not very relevant to this question. We think the apparel industry is probably, in the aggregate, better off with more rapid change because more rapid change generally means more sales per year. On this issue see also Barnett, *supra*.

<sup>82</sup> See discussion at \_\_\_\_\_, *supra*.

So far, our arguments about the nature of the fashion industry's low-IP regime have focused on the United States. But of course the fashion industry is global, and most of the same firms that market apparel in the U.S. also do so in the fashion industry's other creative center, Europe. Interestingly, the European regime affecting fashion designs, an amalgam of national laws and European Union law, is in a formal sense markedly different than the American. European law generally protects fashion designs from copying. Yet we do not see evidence, in either the form of lawsuits or the absence of design copying, that the behavior of fashion industry firms changes much from one side of the Atlantic to the other. This observation suggests that the industry's practices with respect to design copying are not sensitive to changes in legal rules, and that the industry *chooses* to remain within a low-IP regime even where the nominal legal rules are the opposite.

Compared with the U.S., the E.U. provides much more encompassing protection for apparel designs. In 1998 the European Council adopted a European Directive on the Legal Protection of Designs ("Directive").<sup>83</sup> The Directive obliges member states to harmonize their laws regarding protection of *registered* industrial designs, a category that includes apparel designs, and to put in place design protection laws that follow standards set out in the Directive. Those include the following:

- For protection to apply, a fashion design must be registered.
- The owner of a registered design gains exclusive rights to that design. These rights apply not only against copies of the protected design, but also against substantially similar designs – *even those that are the product of independent creation* (this is a patent-like form of protection that extends beyond copyright).
- Protection extends to the "lines, contours, colours, shape, texture and/or materials" of the registered design. It also applies to "ornamentation".

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<sup>83</sup> Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the Legal Protection of Designs, 1998 OJ L 289. The Member States implemented the Design Directive on December 9, 2001.

- A design registration in each member state is valid for a total of 25 years.<sup>84</sup>

Shortly after issuing the Directive, the EC adopted a Council Regulation for industrial designs.<sup>85</sup> This regulation applies the very broad design protections set out in the Directive to all member states without the need for national implementing legislation.<sup>86</sup>

Despite the availability of legal protection in the EU, we see little litigation in Europe involving fashion designs.<sup>87</sup> And, perhaps more importantly, we see widespread fashion design copying – often by the same firms offering similar clothing in both the EU and U.S. markets. Indeed, two of the major fashion copyists—H & M and Zara, each with hundreds of retail outlets in multiple countries—are European firms that expanded into North America only after substantial success at home. For example, Figure K shows a reproduction of a Michael Kors shoe by U.K. retailer Morgan.<sup>88</sup> Although there are

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<sup>84</sup> Id., Article 10.

<sup>85</sup> A directive of the European Council has legal force only after each member state enacts national legislation implementing the directive. The EC cannot create a self-implementing, Community-wide right through a directive. The EC can, however, adopt a Council Regulation, which has automatic legal force in all member states without the need to enact implementing legislation at the national level.

<sup>86</sup> In addition to protection for registered designs, the regulation also provides Community-wide protection for *unregistered* designs. The standards for the unregistered design right closely follow rights previously existing under U.K. law and are narrower than those contained in the Directive. These standards for unregistered design rights do not replace national laws relating to unregistered designs. Thus, subject to certain limitations, an unregistered design rights holder will have a choice between invoking the national law of the member state concerned or the Community-wide right to protect the unregistered design.

<sup>87</sup> See, e.g., *Shirin Guild v. Eskander Ltd.*, [2001] F.S.R. 38, 24(7) I.P.D. 24,047 (U.K. High Court 2001) (finding infringement of a shirt, sweater, and cardigan); *J. Bernstein Ltd. v. Sydney Murray Ltd.*, [1981] R.P.C. 303 (U.K. High Court 1980) (finding infringement of underlying design sketch based on copying of made-up garment). But see *Lambretta Clothing Co. Ltd. v. Teddy Smith (UK) Ltd.*, [2003] RPC 41, 2003 WL 21353286 (Ch. D), [2003] EWHC 1204, [2004] EWCA Civ. 886 (refusing to find copyright infringement based on use of design sketch to create made-up garment). Agins notes that in the 1990s, as the traditional French couture houses came under increasing market pressure, they threatened all kinds of litigation at those who distributed photos of designs shown at the Paris runway shows. But, she recounts, “nothing happened.” Agins, book, at 42-3.

<sup>88</sup> See Mark Tungate, *When Does Inspiration Become Imitation?*, *Telegraph* (Sept. 8, 2005), available at <http://www.telegraph.co.uk/fashion/main.jhtml?xml=/fashion/2005/07/27/efcopy27.xml> (last visited \_\_\_\_).

differences, it is reasonably likely that, under the “substantial similarity” standard that applies in both the EU and U.S. systems, the Morgan shoe would be judged infringing. Figure L shows a dress by French design firm Chloe, and a similar dress sold by U.K. retailer Tesco. The Tesco dress clearly is “referencing” the Chloe dress in a manner that, under applicable EU law, would potentially condemn the Tesco dress as an unauthorized, and thus infringing, derivative work.



Figure K (Michael Kors shoe)



(Morgan shoe)



Figure L (Chloe, Spring/Summer 2005)



(Tesco)

The paucity of lawsuits in Europe and ubiquity of copying is reflected by the apparently scant utilization thus far of the E.U.-wide system for fashion design registration put into place via the E.U. Council Regulation. We conducted a search of the E.U. fashion design registration database for all apparel designs registered between

January 1, 2004 and November 1, 2005.<sup>89</sup> (Any firm or individual marketing apparel in the territory of the E.U. may register a design in this database, and thereby gain protection under the regulations governing registered designs.) During the period in question, firms and individuals registered 1631 designs. Although it is impossible to measure the total number of designs marketed in the twenty-five member states of the E.U. during that period, 1631 designs over a 22 month period would, we believe, represent a very small fraction of that total figure. More to the point, when one examines closely the records of registration in the database, it quickly becomes apparent that the number of actual fashion designs registered is much smaller even than the figure of 1631 registrations would suggest.

Hundreds of the registered “designs” are nothing more than plain t-shirts, jerseys, or sweat shirts with either affixed trademarks or pictorial works in the form of silk-screens or appliqués. The protection sought through registration is not for the apparel design, but for the associated *marks* – matter already protected under applicable trademark law – and affixed pictorial works, many of which are already protected as trade dress and by copyright. Also registered is a large number of pocket stitching designs for jeans – another feature generally covered by trademark law. Thus the function of the registration for all of these items is not to protect an original apparel design, but as a back-up method of protecting a mark or pictorial work over which the owner already enjoys rights. Another large category of registered designs is for work and protective clothing – e.g., surgery apparel, welders’ bibs, military clothing, uniforms for a courier service owned by the German post office. An even larger number of designs pertain to sport apparel (cycling shorts, skiwear, soccer jerseys, etc.) marketed by athletic equipment firms.

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<sup>89</sup> See Office for Harmonization in the Internal Market, Trade Marks and Designs, available at <<http://oami.eu.int/RCDOOnline/Request Manager>>.

Exactly how many registrations count as “fashion designs” is a matter of judgment, but even including all garments that could conceivably fall within that category (i.e., including a large number of men’s and women’s trousers with little apparent design content, t-shirts with potentially copyrightable fabric designs, jeans, and a very small number of men’s suits and ladies’ dresses), at most approximately 800 fashion designs have been registered during the 22 month sample period. But even if we credit every registered design as a “fashion” design, it is nonetheless clear that the total number of registrations (1631) is extremely small compared to the industry’s design output during that period: indeed, 409 of those registrations were made by a *single* firm – Street One GmbH, a mid-tier German “fast fashion” design and retailing firm<sup>90</sup> – and another 391 registrations were made by two other small EU companies that are not familiar names: Creations Nelson<sup>91</sup> (202 registrations) and Mascot International<sup>92</sup> (189 registrations). That three firms – none of which is a leading design originator – account for almost half of all designs recorded in the E.U. registry during the sample period suggests that a huge number of designs that could have been recorded in the E.U. registry were not. That conclusion is supported by the fact that not a single major fashion design

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<sup>90</sup> Street One produces a new womenswear collection every month, see <http://www.street-one.de/en/unternehmen/produkte.html>, and sells their design output through shops around Europe owned by others. See <http://www.street-one.de/en/unternehmen/distribution.html>. Together with its sister companies, Street One claims total revenues of over 400 million Euros, see [http://www.street-one.de/en/unternehmen/Kennzahlen\\_engl-040101.pdf](http://www.street-one.de/en/unternehmen/Kennzahlen_engl-040101.pdf) – a substantial firm, though by no means a leading design firm (By comparison, U.S. fashion and accessories firm Polo Ralph Lauren reported 2004 revenues of over \$3.4 billion.) See <http://www.forbes.com/finance/mktguideapps/compinfo/CompanyTearsheet.jhtml?tkr=RL&cusip=731572103&repno=00038377&coname=Polo+Ralph+Lauren>

<sup>91</sup> A small French firm (22 retail outlets in Paris) that does business under the Comptoir des Cotonniers brand. See <http://www.comptoirdescotonniers.com/>.

<sup>92</sup> A Danish firm that manufactures mostly durable work clothes. See <http://www.mascot.dk/2006/showpage.php?pageid=605228&pid=&cid=&farve=&lang=EN>.

firm or individual designer appears as an “owner” of any design registered in the E.U. database.<sup>93</sup>

Europe thus presents a situation of pervasive but unutilized regulation. Despite a regime that permits registration of designs, few choose to register. The difference between the U.S. and E.U. regimes creates a natural experiment: one would expect to observe some difference in the industry’s conduct – and perhaps variances in industry outcomes – on each side of the Atlantic. More pointedly, if strong IP protection were a *sine qua non* of investment and innovation in fashion design, we would expect to see the European industry flourish and the U.S. industry stagnate.

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<sup>93</sup> Among E.U. member states, France protects useful articles as part of its copyright law, a rule which implicitly accords protection to fashion designs, and also has a separate statute extending patent-like protection to designs, the French Design Act. See Annette Kur, *The Green Paper’s Design Approach: What’s Wrong With It*, 15(10) *European I. P. L. Rev.* 374, 375-76 (1993) (summarizing national laws). The U.K. has a statute establishing rights in registered industrial designs, *The Registered Designs Act 1949*, and this statute includes protection for registered apparel designs. The database recording registered designs is accessible at [http://webdb1.patent.gov.uk/RightSite/formexec?DMW\\_INPUTFORM=tpo/logon.htm](http://webdb1.patent.gov.uk/RightSite/formexec?DMW_INPUTFORM=tpo/logon.htm). Our search of this U.K. database yielded results similar to what we found for the E.U.-wide registry – few designs are registered. As of June 24, 2006, our searches yielded 296 designs in the “undergarments, lingerie, corsets, brassieres, nightwear” category; 960 in “garments”; 313 in “headwear”; 2311 in “footwear, socks and stockings”; 197 in “neckties, scarves, neckerchiefs and handkerchiefs”; 111 in “gloves”; 706 in “haberdashery and clothing accessories”; and 14 in “miscellaneous”. As is the case with the E.U. database, a significant number of entries in the U.K. database are unadorned t-shirts, logos, jeans pocket designs, and other potentially trademarked matter, and graphic designs that would otherwise be eligible for copyright as pictorial works. The number of designs containing significant fashion content is tiny. Only 39 designs are registered in the “dresses” category, 24 in the “skirts” category: two in the “trouser suits” category, and none in the “skirt suits” category. And we could find no evidence of major design firms registering clothing designs. Chanel, for example, appears to have registered a few watches, handbags, and jewelry items, but no clothing designs. Gucci as well appears to have registered a small number of watches and two handbags, but no clothing designs. We could not find any registrations for other major firms or designers such as Ralph Lauren, Chloe, Yves St. Laurent, Balenciaga (or its chief designer Nicolas Ghesquiere), Dolce & Gabbana, Michael Kors, Diane Von Furstenberg, or Karl Lagerfeld.

As has previously been mentioned, the U.K. also provides a right for unregistered designs in the Copyright, Designs and Patents Act 1988. See G. Scanlan, *The Future of Design Right: Putting s51 Copyright, Designs and Patents Act 1988 in its Place*, 26(3) *Statute L. Rev.* 146 (2005). For both the registered and unregistered right, however, we see little litigation or other evidence of enforcement across the E.U.

Yet we observe no substantial variances in conduct. Instead, we see widespread design copying in both the E.U.'s high-IP environment and America's low-IP environment. That fashion firms do not exhibit marked differences in behavior despite these very different legal environments is consistent with our claim that the industry operates profitably in a stable low-IP equilibrium. For E.U. fashion firms that wish to stop copyists, the law is in place. Yet in practice designers rarely employ E.U. law to punish copyists. The one famous and much-mentioned example of design piracy litigation in Europe is the Lauren lawsuit mentioned earlier. Yet that case is notable mostly because it has so few equivalents. With respect to comparative industry performance, we cannot say much. Firms usually operate in both jurisdictions, and buying by U.S. retailers often takes place in the E.U., and vice versa, making revenue and profitability comparisons across regions difficult or impossible. Yet we can say at least that we detect no obvious disinclination of fashion firms to market in the U.S., and the fact that firms in both the E.U. and U.S. engage in design copying suggests that the nominal difference in legal rules has had no substantial effect on the real rules that govern innovation in either jurisdiction.

This cross-jurisdictional comparison has important implications for the recent bill introduced in Congress to amend U.S. law to protect fashion designs for a short period. The EU experience suggests that such a statutory change is unlikely to have a great effect on industry behavior. We would, however, expect to see more litigation over design piracy in the United States than in Europe simply because we are a more litigious society, with a set of legal rules and procedures that enable lawsuits to be brought readily. More significantly, it is unlikely that a statutory change to American IP law would produce more innovation in the fashion industry, and innovation is the sine qua non for IP protection in the United States. We are doubtful for two reasons.

First, and most compellingly, it is clear that the fashion industry is already very creative and innovative. This claim does not depend on our particular account of the piracy paradox; it is an empirical observation that few who have looked at the industry have contested. It is surely possible that the fashion industry could be even

more innovative than it is now, but it is hard to know what that would look like: a faster fashion cycle? More varied designs each season? More differentiation among designers? (The latter is the most likely effect in our view, since our account of anchoring rests on the claim that the prevalence of trends in fashion is in part driven by the regime of free appropriation.) The second reason we believe that a legislative change would have minimal impact on the fashion industry is the experience of Europe. The proposal currently before Congress would mimic in some important ways prevailing EU law. And as we have shown, there is little empirical evidence that this law has made any appreciable difference in the rate or amount of copying or of design innovation. Nor do we observe fashion designers availing themselves of the full possibilities presented by the law. While a full-blown normative analysis is the topic for the future, the positive analysis presented in this article at least suggests that any change from a low-IP system to a high or mid-level of protection will not have a dramatic effect on innovation.<sup>94</sup>

**e. Alternative Explanations for the Fashion Industry’s Low-IP Equilibrium**

We have argued that the stability of fashion’s low-IP regime results from the paradoxically beneficial effects of copying. Are there other possible explanations for this political equilibrium—an equilibrium that has lasted since the 1940s? Below we consider two plausible alternatives – (1) that copyright’s useful articles doctrine prevents expansion of copyright to cover fashion designs, and (2) that the fashion industry is unable to organize itself to pursue changes in the law.

**i. Copyright Doctrine as a Barrier**

Perhaps the fashion industry would prefer expanded copyright protection for its designs, but change is stymied by “useful articles” rules that are deeply embedded in the doctrinal structure of the copyright laws. In other words, do the useful articles rules pose an insurmountable obstacle to change?

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<sup>94</sup> [note here about testimony before the sub-committee]

We think the answer is no, for at least two reasons. First, the rules about useful articles are not part of the viscera of U.S. copyright – they are rather a surface feature, and one that could easily be changed. Indeed, in one area directly analogous to fashion design copyright law has already been changed to provide protection where none previously existed. Second, the useful articles doctrine is no barrier to *sui generis* protection of the type that has been provided, on the federal level, to industrial designs in the semiconductor and boat hull industries. The availability of *sui generis* protection would allow an IP-hungry fashion industry to elide whatever difficulties might be involved in altering copyright’s useful articles rules.

***The Malleable Useful Articles Rule.*** As a general matter the Copyright Act grants exclusive rights in “original works of authorship” that are “fixed in a tangible medium.”<sup>95</sup> Two-dimensional renderings of fashion designs – the precursor to the three-dimensional product – are already protected if they contain a modicum of originality. So a designer’s sketch of a new dress design is protected by copyright. One might conclude that the three-dimensional fashion product would be protected as well – the design being the original work of authorship, and fixation being the three-dimensional rendering in a garment. But this is plainly not the case: copyright’s rules about useful articles deny copyright protections to garments containing original designs unless the expressive content is separable from the garment’s useful function.<sup>96</sup>

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<sup>95</sup> Copyright Act, sec. 102.

<sup>96</sup> As mentioned, U.S. law grants copyright (as a pictorial work) in a two-dimensional sketch of a fashion design. This protection, however, is almost entirely useless under U.S. law because almost all fashion appropriation involves copying from a sample or a photograph of an actual garment, not copying from a design sketch, and U.S. law does not make copying from a garment equivalent to copying from the underlying sketch. A relatively direct path to expanded protection for fashion designs would change U.S. law to allow an infringement finding to be based on the underlying copyright in the design sketch. We have found one judicial decision from the U.K. High Court of Justice that takes this approach. See *J. Bernstein Ltd. v. Sydney Murray Ltd.*, [1981] R.P.C. 303 (U.K. High Court 1980) (finding infringement of underlying design sketch based on copying of made-up garment). Accordingly, even if the useful articles doctrine stood as a more substantial doctrinal barrier than we believe it to be, the fashion industry has an alternative path to protection.

The protection of useful articles has long straddled an indistinct boundary between copyright, which exists to protect *original expression*, and patent, which protects *useful inventions*, or, in the case of design patents, *novel ornamental designs*. Note that the “novelty” standard that applies in patent is substantially higher than the “originality” requirement that obtains in copyright. The former limits protection only to those useful inventions or ornamental designs that have never before been produced – i.e., that are “unanticipated” in the prior art. The latter requires only lack of copying and some glimmer of creativity.

The same useful article may, of course, have a market appeal based both on its usefulness and its appearance (i.e., its original, expressive element). The Supreme Court considered copyright in such an article in *Mazer v. Stein*.<sup>97</sup> *Mazer*, decided in 1954, held that a statuette used as part of a lamp base could be copyrighted. In so holding, the Court adopted the Copyright Office’s then-extant standard providing protection for “works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware and tapestries . . .”<sup>98</sup> Following *Mazer*, courts have held artistic jewelry<sup>99</sup>, designs printed upon scarves,<sup>100</sup> and dress fabric designs,<sup>101</sup> [Chris: per Lemley we need to have a section or at least more on why fabric designs are protected. At least we need to flag that this is maybe a puzzle or area for future research. Since you know the caselaw I leave this to you] to be protected by copyright. These courts appeared to read the *Mazer* opinion as ratifying copyright for the form of any useful article that is also aesthetically pleasing in appearance.

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<sup>97</sup> 347 U.S. 201 (1954).

<sup>98</sup> 37 C.F.R. sec. 202.10(a) (1959).

<sup>99</sup> See, e.g., *Kisselstain-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980).

<sup>100</sup> See, e.g., *Scarves by Vera, Inc. v. United Merchants & Mfrs.*, 173 F. Supp. 625 (S.D.N.Y. 1959).

<sup>101</sup> See, e.g., *Segrets, Inc. v. Gillman Knitware Co., Inc.*, 42 F. Supp.2d 58 (D.Mass. 1998), rev’d in part on other grounds, 207 F.3d 56 (1<sup>st</sup> Cir. 2000); *Peter Pan Fabrics v. Candy Frocks, Inc.*, 187 F.Supp. 334 (S.D.N.Y. 1960).

In the wake of *Mazer* and the lower court decisions taking an expansive approach to copyright in useful articles, the U.S. Copyright Office issued regulations seeking to narrow copyright's application in this area:

If the sole intrinsic function of an article is its utility, the fact that it is unique and attractively shaped will not qualify it as a [copyrightable] work of art. However, if the shape of a utilitarian article incorporates features, such as artistic sculpture, carving, or pictorial representation, which can be identified separately and are capable of existing independently as a work of art, such features will be eligible for [copyright].<sup>102</sup>

This formulation, which the Copyright Office characterized as “implement[ing]” *Mazer*, is more accurately viewed as substantially narrowing that holding. Whereas the *Mazer* Court's decision would allow most aesthetically pleasing useful articles to gain copyright protection, the Copyright Office approach would limit protection to instances in which a useful article's expressive element is “separable” in some sense.

The present Copyright Act follows the Copyright Office approach in sharply limiting the applicability of copyright to many useful articles – and, indeed, goes further than even the Copyright Office regulation in narrowing protection. Today the Copyright Act denies copyright protection to any article having “an intrinsic utilitarian function” – a broader definition of the useful articles category than the regulation's “sole intrinsic function.”<sup>103</sup> In addition to this definitional tinkering, the Act does something that is probably more important in litigation: it establishes a presumption that cuts against the separability of expression and utility: “[a]n article that is normally a part of a useful article is considered a ‘useful article’.”<sup>104</sup>

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<sup>102</sup> 37 C.F.R. sec. 202.10(c) (1959).

<sup>103</sup> Copyright Act, sec. 101 (emphasis supplied).

<sup>104</sup> Id.

The debates over how to implement the useful articles rules aren't particularly important for our purposes here.<sup>105</sup> The important point is that the decision to limit copyright protection of the expressive elements contained in useful articles is not somehow entailed in copyright doctrine, but is a policy choice. Jurisdiction over most useful articles has been allocated to the patent laws, which enforce a novelty standard that most useful articles cannot meet. This policy decision could readily have gone another way – and indeed, if the Supreme Court's *Mazer* standard had been left alone, it would have. Equal emphasis could have been given to protection of the useful article's expressive elements, with responsibility allocated to the copyright laws to protect the aesthetic component of the article's market value and to the patent laws to protect the utilitarian component.

***Erasing the Useful Articles Rule: Architecture.*** In sum, we see that Congress could easily change the useful articles rule – and thereby extend copyright to fashion design – without disturbing the broader coherence of the copyright laws.<sup>106</sup> And, not

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<sup>105</sup> For an extended discussion of the various approaches to the separability analysis, see *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913 (7<sup>th</sup> Cir. 2004) (en banc).

<sup>106</sup> If the useful articles rules were changed, any design that appropriates elements of another design to the extent of "substantial similarity" would transgress the originator's exclusive rights. Courts have set out varying articulations of the test for substantial similarity, all of which have focused on the subjective impressions of a notional "ordinary observer". The Seventh Circuit directs factfinders to inquire "whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value." *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 614 (7<sup>th</sup> Cir. 1982). The Ninth Circuit has relied on the intuition of idealized consumers, holding that "a taking is considered de minimus [and thus insufficient to support infringement liability] only if it is so meager and fragmentary that the average audience would not recognize the appropriation." *Fisher v. Dees*, 794 F.2d 432, 434 n. 2 (9<sup>th</sup> Cir. 1986). *Accord, Newton v. Diamond*, 388 F.3d 1189, 1193 (9<sup>th</sup> Cir. 2004) (en banc). The Second Circuit has articulated a similar test: "Two works are substantially similar where the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal [of the two works] as the same." *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998) (internal quotations and citations omitted).

In practice, the courts' implementation of the test has resulted in a low threshold for finding infringement. More important for our purposes than courts' differing articulations of the standard of liability is one overarching verity: Under any of the various articulations of the substantial similarity standard that courts have applied to other media, the copying of apparel designs illustrated in the figures above would be actionable. As a result, if the useful articles rules were modified to extend copyright to

surprisingly, Congress has illustrated the malleability of the rule by altering it to provide design protection for a type of creative work that until recently was, like fashion, kept on the periphery of copyright's domain.<sup>107</sup> We refer to buildings, many of which (like apparel) embody original designs and yet perform a utilitarian function. Although architectural drawings and models have long been within the ambit of copyright,<sup>108</sup> architectural designs embodied in actual buildings ("built" architecture) have traditionally been unprotected. Accordingly, until recently, although it may have been unlawful to copy a set of blueprints, it was entirely lawful, if one possessed a set of those blueprints,

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apparel designs, the current substantial similarity doctrine would expose many designs to challenge under the copyright laws. And this would create substantial disruption for the industry. Fashion firms couldn't resort, as software industry firms do, to designing apparel in a "clean room" – i.e., in an environment in which engineers design software and write code without access to the code of competitors' products. Because fashion designers are immersed in their competitors' products once they leave work, there is no such thing in fashion as a clean room.

This does not mean, however, that copyright doctrine is a substantial barrier to expansion of copyright to embrace fashion design, for the substantial similarity test is as malleable as the useful articles rules. The industry could, for example, ask for changes to the copyright law that would make only point-by-point copies actionable. Some courts have already moved in that direction with respect to claims of copyright on the selection and arrangement of data in databases. It is entirely possible for copyright to expand to cover fashion design, while the scope of permissible copying is maintained at some level that allows copying in the context of substantially transformative works, while disallowing very close or point-by-point copies. Such a development would replace a low-IP regime not with the usual high-IP regime that obtains in the music, film or publishing industries, but with a moderate-IP regime calibrated to the particular creative environment of the fashion industry, with its historically greater tolerance of design appropriation. This has, of course, not happened, but not because copyright doctrine is a substantial barrier to such developments.

<sup>107</sup> In addition, the fashion industry, heavily concentrated in New York and California, could very well have sought protection under state law. One may plausibly argue that because the federal copyright laws don't extend to most apparel designs, the states are free to regulate, either via statute or judicial development of state common law copyright. Such an argument traditionally has met the rejoinder that state common law protection is limited to unpublished works, but a recent decision of the New York Court of Appeals in *Capitol Records v. Naxos*, NYSlipOp 02570 (Apr. 5, 2005) (Graffeo, J.), holds that even *published* musical recordings are subject to a perpetual common law copyright under New York state law. The *Naxos* holding would possibly support an argument extending copyright or copyright-like state law protections to "published" (i.e., previously distributed) fashion designs.

<sup>108</sup> See, e.g. *Imperial Homes Corp. v. Lamont*, 458 F.2d 895, 899 (5<sup>th</sup> Cir. 1972); *Herman Frankel Org. v. Tegman*, 367 F.Supp. 1051 (E.D. Mich. 1973).

to erect a building based on them. Similarly, it was entirely lawful to examine an already-existing building, take measurements, and then erect a facsimile.<sup>109</sup>

That changed in 1990, when Congress amended the Copyright Act to extend protection to a category of “architectural works.” In the Architectural Works Copyright Protection Act (AWCPA),<sup>110</sup> Congress defined a protected “architectural work” to include “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.”<sup>111</sup> The same provision that extended copyright to built architecture also limned the contours of that protection, providing that “[t]he work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”<sup>112</sup> What Congress has done, in expanding copyright protection to cover building designs, could easily be done again for fashion designs. In the case of architectural works, Congress has simply reversed the traditional presumptions of the useful articles doctrine as it applies to a building’s design. The same erasure applied to fashion would result in broad copyright protection for original designs.

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<sup>109</sup> This is not to suggest that copyright had no relevance to “built” architecture. Architectural works that served purely ornamental purposes, such as grave markers, were protected because they were deemed to lack utility and were thus outside the category of useful articles. See, e.g., *Jones Bros. v. Underkoffler*, 16 F.Supp. 729 (M.D. Pa. 1936). And purely decorative elements of a building – e.g., a gargoyle adorning a building’s cornice – were protected, because these were, in effect, sculptural works that were “separable” from the building as a whole. But these were minor exceptions to the general rule that the overall appearance of a building, as opposed to the blueprints or a model of that building, was unprotected.

<sup>110</sup> Title VII of the Judicial Improvements Act of 1990, P.L. 101-650, 104 Stat. 5089 (effective Dec. 1, 1990).

<sup>111</sup> 17 U.S.C. § 101 (2000).

<sup>112</sup> *Id.* (emphasis supplied). The effect of the last clause is not entirely clear, but it suggests that liability ordinarily cannot be predicated on the copying of particular elements of the design of a building when the overall design is not copied. The legislative history supports such a reading, stating that the separability test that applies to other types of useful articles does not apply to architectural works, and that it is “the aesthetically pleasing overall shape of an architectural work could be protected . . . .” H.R. Rep. 101-735, 101<sup>st</sup> Cong., 2d Sess. 20-21 (1990).

***Eliding the Useful Articles Rule: Semiconductor “Mask Works” and Boat Hulls.*** In addition to erasing the useful articles rule in the case of built architecture, Congress has also, on two occasions, elided the rule by constructing *sui generis* forms of protection (i.e., copyright-like protection outside the Copyright Act) for two classes of useful article – semiconductor “mask works” and boat hulls. We will examine each briefly.

***Semiconductors.*** In 1984, Congress adopted the Semiconductor Chip Protection Act.<sup>113</sup> The SCPA protects “mask works”, which are the stencils used to control the process of etching onto silicon wafers the circuitry that make up a microprocessor. The production of these mask works, and the transistor and layout design work they graphically embody, requires significant investment, amounting often to many millions of dollars.<sup>114</sup> Congress stated that the “appropriation of creativity” by those copying mask works would be a “devastating disincentive to innovating research and development.”<sup>115</sup> Under the SCPA, a mask work is protected if it is “fixed” (i.e, if it has been employed in creating a semiconductor chip product), and original.<sup>116</sup> Protection is limited to the works of U.S. nationals and domiciliaries,<sup>117</sup> or to works first commercially exploited in

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<sup>113</sup> Act of Nov. 8, 1984, Pub. L. 98-620, 98 Stat. 3347.

<sup>114</sup> As the House Report on the SCPA noted, “A competing firm can photograph a chip and its layers in several months and for a cost of less than \$50,000 duplicate the mask work of the innovating firm.” House Rep. (SCPA), p. 2.

<sup>115</sup> *Id.* at 2-3. U.S. protection of mask works also arises from, and is subject to, treaty obligations. The 1992 Washington Treaty was the first instrument to set international standards for the protection of mask works. Treaty on the Protection of the Layout-Designs of Integrated Circuits, 57 Fed. Reg. 56,327 (Nov. 27, 1992), reprinted in Copyright Law Reporter (CCH) Para. 20, 706. the U.S. never adhered to the Washington Treaty. The U.S. is bound, however, by the provisions on mask works contained in TRIPs.

<sup>116</sup> H. Rep. (SCPA), p. 34. In addition to the originality requirement of Section 902(b)(1), Section 902(b)(2) limits protection to those mask works that are not “staple, commonplace, or familiar in the semiconductor industry.” This language has prompted a debate whether the SCPA imposes a patent-like standard of novelty. See 2 Nimmer 8A.03[B].

<sup>117</sup> 17 U.S.C. Sec. 902(a)(1)(A)(i). It has been argued that the U.S. is obligated under the Berne Convention to protect foreign mask works, but the U.S. does not to date provide such protections. See 2 Nimmer 8A.04[D][1].

the U.S., regardless of the nationality of ownership.<sup>118</sup> In addition, the SCPA requires that mask works either be registered with the Copyright Office, or commercially exploited, as a condition of protection.<sup>119</sup>

Once an owner complies with the SCPA's formalities, he possesses the exclusive right for a period of ten years "to reproduce the mask work by optical, electronic, or any other means."<sup>120</sup> The exclusive right of reproduction granted is, as in the copyright law, not limited to identical copies. The owner of a mask work protected by the SCPA has the right to enjoin any work that is "substantially similar" to the protected work.<sup>121</sup> The SCPA also gives the owner an exclusive right for the same 10-year period "to import or distribute" a chip for which the protected mask work has been used in production.<sup>122</sup>

*Boat Hulls.* Congress has also granted *sui generis* design protection in boat hulls. In response to the decision in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,<sup>123</sup> in which the Supreme Court invalidated a state law prohibiting the process by which boat manufacturers copied the designs of other manufacturer's boat hulls, Congress passed the

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<sup>118</sup> 17 U.S.C. Sec. 902(a)(1)(B).

<sup>119</sup> 17 U.S.C. Sec. 904(a). The SCPA is, therefore, a "conditional" system of protection – i.e., a system that creates property rights only when the "author" of a mask work indicates (either through commercial exploitation or via registration) that protection is necessary. In this feature the SCPA resembles the U.S. copyright system as it existed from the founding copyright act of 1790 up to 1976, when the current Copyright Act was put in place. The law during this period of nearly two centuries was conditional, in that it required authors to take steps, such as registering their works and marking published copies with copyright notice, in order to gain the protection of the law. See Christopher J. Sprigman, *Reform(aliz)ing Copyright*, 57 *Stan. L. Rev.* 485 (2004). In contrast to conditional schemes like the SCPA, the current "unconditional" copyright laws provide that copyright arises automatically upon unlike the fixation in a tangible medium of an original piece of expression. It also requires that, if protection arises via commercial exploitation, that registration occur within two years, or protection is limited to the two-year period. 17 U.S.C. Sec. 901(a)(5).

<sup>120</sup> 17 U.S.C. Sec. 905(1).

<sup>121</sup> 2 *Nimmer* 8A.069[A].

<sup>122</sup> 17 U.S.C. Sec. 901.

<sup>123</sup> 489 U.S. 141 (1989)

Vessel Hull Design Protection Act (VHDPA).<sup>124</sup> Enacted as a part of the Digital Millennium Copyright Act, the VHDPA restores the protection removed in *Bonito Boats*, though it leaves intact the Supreme Court’s ruling that the states are preempted by federal law from providing such protection.

The VHDPA gives owners exclusive rights for a period of ten years in the “design of a vessel hull, including a plug or mold” used in the construction of that hull.<sup>125</sup> Protection is limited to “original” designs, which the statute defines as those which are “the result of the designer’s creative endeavor that provides a distinguishable variation over prior work pertaining to similar articles which is more than merely trivial and has not been copied from another source.”<sup>126</sup> The Act grants the owner the exclusive right to “make, have made, or import” any boat hull incorporating the protected design.<sup>127</sup> It also grants the exclusive right to sell or distribute any hull incorporating the protected design.<sup>128</sup> The Act protects any element of a hull design “which makes the article attractive or distinctive in appearance to the purchasing or using public . . . .”<sup>129</sup> In addition, protection is granted even for elements of hull design that are strictly utilitarian in function.<sup>130</sup>

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<sup>124</sup> Act of Oct. 28, 1998, Pub. L. 105-304, 112 Stat. 2860, Sec. 501 (short title).

<sup>125</sup> 17 U.S.C. Sec. 1301(a)(2).

<sup>126</sup> 17 U.S.C. Sec. 1301(b)(1).

<sup>127</sup> 17 U.S.C. Sec. 1308(1).

<sup>128</sup> 17 U.S.C. Sec. 1308(2).

<sup>129</sup> 17 U.S.C. Sec. 1301(a)(1).

<sup>130</sup> *Id.* Like the SCPA, the VHDPA imposes mandatory formalities. Designs must be registered with the Copyright Office within two years after a hull design is made public, or protection is forfeit. 17 U.S.C. Sec. 1310(a). And protected designs must be marked with a prescribed form of notice of protection (17 U.S.C. Sec. 1306(a)(1)(A)); omission of notice precludes recovery against an infringer who “began an undertaking leading to infringement . . . before receiving written notice of the design protection.” 17 U.S.C. Sec. 1307(b).

Both the semiconductor and the vessel hull acts create *sui generis* but “copyright-like” forms of protection; both elide copyright’s useful articles rule and protect original expression that would not be protectable under copyright because the expression is compounded into a useful article. It is also worth noting that the VHDPA was originally written as a general design protection law. The statute could be readily extended to cover not just vessel hulls but also fashion or any other form of industrial design. All Congress would have to do is change the non-intuitive definition of “useful article” in § 1301(b)(2) – and indeed that is the exact approach taken in the pending design piracy bill discussed earlier, H.R. 5055, which simply inserts “fashion design” alongside “design of a vessel” in the VHDPA’s definition of “design”, and attaches a 3-year period of protection to the newly-protected design category. In sum, Congress could limit the scope of the useful articles rule – as it has for built architecture – or it can simply elide it, as it has for semiconductor mask works and boat hulls. Copyright doctrine presents no substantial barrier to protection of original fashion designs.

## ii. Political Barriers

If fundamental copyright principles do not bar the protection of fashion design, perhaps there are political barriers that have prevented designers from acquiring protection from Congress. These barriers might come in two varieties. First, simple collective action problems may impede designers from effectively organizing to lobby Congress. As we noted earlier, the fashion industry, unlike most other content industries, is quite deconcentrated. Second, there may be a problem of “rival rent seekers.” Perhaps the fashion *retail* sector has markedly different preferences than does the fashion *design* sector, and the former is more powerful politically, such that it blocks efforts by the latter to modify federal law to be more design-protective.

The collective action problem is easy to state. Mancur Olson famously argued that small groups are often better able than large groups to organize support of or opposition to policy proposals that matter to them. Each member of a small group may have a large stake in a particular proposal, while individual members of the large group

each have a small stake and are thus hard-pressed to overcome the transaction costs involved in organizing.<sup>131</sup> As the number of actors rises, the incentive problem becomes more severe. Hence sugar consumers, who are numerous, fail to effectively organize to ensure low sugar prices, whereas sugar producers, who are few, successfully organize to keep out cheaper imports.

Many IP-protected industries are highly concentrated, and as a result they have little problem organizing to strengthen IP protection. For example, the recording industry has a small number of major firms and a powerful trade association, the RIAA. Likewise, the motion picture industry consists of a small number of major producers and a larger number of smaller ones, most of which cooperate under the aegis of the MPAA. These trade associations protect the interests of these industries in Congress, the executive branch, the courts, state capitals, and abroad. Indeed, they have been instrumental players in many recent expansions of copyright.

If the fashion industry was unable to effectively organize itself, the puzzling lack of copyright protection might be explicable as an Olsonian problem. In other words, perhaps it is not that designers benefit in any way from unfettered copying, or that copyright doctrine somehow is the barrier to change, but rather that designers are simply unable politically to bargain for the protection they desire. But American fashion designers are organized and do have a trade association that represents their interests: the Council of Fashion Designers of America. The Council, based in New York, has 273 members, including such well-known names as Kenneth Cole, Calvin Klein, John Varvatos, and Vera Wang. The Council does many things, including working “to advance the status of fashion design as a branch of art and culture,” promoting achievement in fashion design, and sponsoring charitable programs.<sup>132</sup> Lately the Council has lobbied on behalf of H.R. 5055. , though it was previously inactive on the issue of IP

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<sup>131</sup> Mancur Olson, *The Logic of Collective Action* (1965).

<sup>132</sup> [www.cfda.com/flash.html](http://www.cfda.com/flash.html)

protection [Check this] Since 1980 there have been at least ten bills introduced in Congress that addressed design protection generally. Most exempted apparel expressly; for example, the proposed “Industrial Design Anti-Piracy Act of 1989” specifically exempted from protection designs “composed of three-dimensional features of shape and surface with respect to men’s, women’s and children’s apparel, including undergarments and outerwear.”<sup>133</sup> There is no evidence in the legislative history of any of these bills that fashion designers testified in favor of change or lobbied for change. In any event, the recent efforts, however weak, to support the proposed fashion design bill illustrate that there is no insuperable barrier to lobbying Congress. At the same time, the extent of the lobbying is quite low—an observation consistent either with our argument that copying is not much of a threat to designers or with a claim that there are other political barriers in place that we have not recognized.

It is also possible that more subtle political barriers are at play. Perhaps the fashion *retail* industry prefers a low-IP regime, which permits them to copy designs and sell them at various price levels. Fashion designers might desire a high-IP regime, but perhaps the retailers have prevailed over the designers in this struggle. Is there evidence for this “rival rent-seekers” claim?

We find little support for the hypothesis that retailer opposition is a major factor in explaining the political equilibrium of low protection, and there are several reasons to doubt that the “rival rent-seekers” story is significant. First, many large retail firms are also designers themselves – either via the work of in-house designers producing own-label apparel, or contractually, in the form of exclusive arrangements to market a designer collection. It is true that many house-label clothes, such as the Barneys house label, closely track designs pioneered by other designers. But not all own-label product is derivative. An example of the mingling of original design and retailing is U.S. mass retailer Target, which has for several years offered an exclusive collection by U.S.

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<sup>133</sup> H.R. 3017, 101st Cong, 1st Session.

designer Issac Mizrahi, and this year is offering a “Go International” collection by designers Luella Bartley and Tara Jarmon.<sup>134</sup> (Last year H & M had a similar exclusive arrangement to offer a collection by Chanel designer Karl Lagerfeld.) Recently, worldwide retail giant Wal-Mart opened an in-house fashion design department to produce its own-label “Metro 7” fashion line; Wal-Mart has also been reported to be interested in buying the Tommy Hilfiger design firm. In the case of retailers that, like Target and perhaps Wal-Mart, pursue an apparel strategy based on offering own-label clothing and exclusive access to a designer’s output at a particular price point, the interests of retailer and designer in preventing appropriation of the original design become more difficult to differentiate.

Viewed from the perspective of the orthodox high-IP framework, retailers who also engage in design work have at least some incentive to prevent appropriation and maintain exclusivity. But they also plainly benefit from a low-IP system, since they can use their house label to more readily copy designs pioneered elsewhere. The optimal strategy for any particular retailer is hard to predict *ex ante*. But there is little reason to conclude that retailers face markedly strong incentives to favor the current low-IP regime. Similarly, there is only scant evidence, either in the debates preceding the enactment of the Copyright Act of 1976, or the various general design protection measures that from time to time have been proposed, that designers have jointly or severally mounted a serious political campaign to obtain IP protection only to be defeated in Congress by the power of the retailing lobby. That said, retailers apparently have voiced some concerns about the implications of HR 5055, and have informally sought to ensure that the standard for infringement is loose enough that designs that do not closely mimic an original will not be deemed infringing.<sup>135</sup> But we find no evidence to date that they have coalesced to oppose the bill.

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<sup>134</sup> Ylan Q. Mui, Where Target is Always “Tar-zhay”, *Washington Post D1* (June 21, 2006).

<sup>135</sup> Email from CFDA head on HR 5055 progress, July 5, 2006

Second, even if most retailers do not currently engage in significant design work, it is not clear, at the level of theory, that even “pure” retailers would inevitably prefer a low-IP regime. In the current low-IP environment, major retailers like Bloomingdale’s are free to follow apparel trends by purchasing and reselling original designs and also by offering, via the brands of copyist firms and under their own-label brands, reproductions and derivatives. Of course, the low-IP regime applies equally to their competitors, and freedom to appropriate original designs means that Bloomingdale’s will seldom be able to keep popular designs to itself for long. As a consequence, the firm’s option to pursue exclusivity will be limited to marks. We cannot predict, at the level of theory and without knowing much more about the business strategies of individual firms, whether a particular retailer would prefer a low-IP environment in which product differentiation in fashion is limited to brands, or a higher-IP environment in which retailers differentiate not just via brands but also designs. It may be that some retailers, probably a minority, would prefer a strategy of differentiation via style exclusivity. These retailers would face incentives to prefer a higher-IP regime.

Third, and perhaps most convincingly, the “rival rent-seeking” hypothesis is met by powerful countervailing evidence from Europe, where the industry operates in a very different legal environment but does not appear to conduct itself any differently with respect to copying. If the barrier to legal change in the U.S. was the power of retailers, to explain the existence of the different nominal rule in Europe we would need an argument for why European retailers are comparatively weaker than their American counterparts. Such an explanation would be especially unlikely given that two of the largest retail copyists—H & M and Zara—are both European companies. Further, if expanded design protection was helpful to designers in Europe, we would expect to see the existing law used, and many more infringement suits brought. The few infringement suits that have been brought have plainly not deterred copyists. And the failure of fashion firms to act upon the available protections by registering their designs suggests that to the extent that retailers favor a low-IP regime, the designers are not necessarily their “rivals”, but perhaps their allies.

### **III. PARADOX OR PARADIGM? INNOVATION AND COPYRIGHT'S NEGATIVE SPACE**

The fashion industry flourishes despite a near-total lack of protection for its core product, fashion designs. That this low-IP regime has remained stable over more than half a century, and that significant innovation and investment is undertaken within it, is a profound, if overlooked, challenge to the standard account of IP rights. We believe that the models we have advanced to explain the fashion industry's peculiar innovation ecology are valuable in themselves, in that they help explain an important anomaly in American law. But the next and ultimately more important question is whether the fashion industry has anything to say about the orthodox justification for IP rights more generally.

Our arguments thus far suggest that the particular structure of the fashion industry, and the rules by which it runs, are idiosyncratic. But the same may be said of the music industry, the film industry, the software industry, the market in artistic photographs, commercial graphic designs, romance novels, lyric poetry, scholarly monographs, and so forth. Copyright law occasionally creates special rules for particular industries – U.S. law imposes, for example, a compulsory license for “mechanical rights” to perform musical compositions,<sup>136</sup> thereby replacing the default property rule with a liability rule specific to the music industry. This specialized rule contributes to a creative environment in which the reworking of popular (and even obscure) compositions is common practice. But for the most part, the exclusive rights created by U.S. copyright law are not sensitive to the characteristics of particular industries; the law imposes, for example, virtually the same rules on one-hundred million dollar motion pictures that it does on the two-cent labels on shampoo bottles, even though the nature of creativity in

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<sup>136</sup> Copyright Act, sec. 115.

these two settings, and the level of investment required to maintain creativity, is very different.<sup>137</sup>

Copyright law largely ignores these differences; to do otherwise would add substantial complexity to an already Byzantine regulatory scheme. That strategy carries with it, however, a subtle cost: we are not often called upon to fit the scope of copyright, or its duration, to particular industries. As a result, we rarely have occasion to think about industry-specific copyright rules. Much the same is true of patent, and as a result we are not induced to focus on any particular industry's innovation economics when constructing patent rules. We fall back, instead, on an abstract orthodox justification for IP rights which may make perfect sense as a general matter but which is nonetheless insensitive to important industry characteristics that make IP rules more or less relevant in particular markets.

The first step in thinking about how different industries fit with different rules is to consider why, and when, industries are left out of the IP system altogether. The fashion industry is interesting because it is part of copyright's "negative space." It is a substantial area of creativity into which copyright and patent do not penetrate, and for which trademark provides only very limited propertization. To date there has been little systematic exploration of what else falls within this negative space.<sup>138</sup> If there are any broader conclusions we can draw about the *necessity* (vs. the current convenience) of strong IP rights in any of the industries that operate in a high-IP environment, such conclusions would rest on more solid ground if we better understood the variety of

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<sup>137</sup> On industry specificity in IP see Joseph Liu, *Copyright Law and Subject-Matter Specificity: The Case of Computer Software*, 60 NYU Ann. Surv. Am. L. (2005); Dan Burk and Mark Lemley, *Tailoring Innovation Law: Shaping Patent Policy for Specific Industries*, forthcoming; Michael Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, forthcoming, 55 Am. U. L. Rev. (2006).

<sup>138</sup> One could reasonably include within copyright's negative space not only areas of innovation that are largely immune from copyright altogether, such as fashion, but also the "carve outs" within areas plainly covered by copyright, such as the doctrine of fair use as applied to published books. There is certainly substantial attention to these latter issues in the existing literature, and many odd examples. See eg. David Nimmer *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 Hous. L. Rev. 1 (2001)

existing low-IP equilibria. The final part of this article is a brief first cut at exploring these issues.

### A. Creative Cuisine

Several years ago Jessica Litman noted that, like fashion, important products produced by the food industry are not covered by copyright<sup>139</sup>. We nonetheless continue to see substantial creativity in cuisine. Litman uses a counterfactual to make her point about the relationship between IP and food:

[I]magine that Congress suddenly repealed federal intellectual property protection for food creations. Recipes would become common property. Downscale restaurants could freely recreate the signature chocolate desserts of their upscale sisters. Uncle Ben's® would market Minute® Risotto (*microwavable!*); the Ladies' Home Journal® would reprint recipes it had stolen from Gourmet® Magazine. Great chefs would be unable to find book publishers willing to buy their cookbooks. Then, expensive gourmet restaurants would reduce their prices to meet the prices of the competition; soon they would either close or fire their chefs to cut costs; promising young cooks would either move to Europe or get a day job (perhaps the law) and cook only on weekends. Ultimately, we would all be stuck eating Uncle Ben's Minute Risotto® (*eleven yummy flavors!!*) for every meal.

Litman's playful observations are characteristically insightful: Food is another huge industry that operates—and innovates—in a low-IP environment. To be precise, Litman refers to two discrete elements of a much larger total industry: (1) recipes, and (2)

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<sup>139</sup> Litman, *supra*. That hasn't stopped creative lawyers from seeking alternate forms of protection for culinary creations. See Katy McLaughlin, 'That Melon Tenderloin Looks Awfully Familiar', Wall St. J. June 24 2006 at P1 (noting that "Chefs copying other chefs is as time-honored a culinary tradition as snooty sommeliers" but that now "some chefs are seeking patents for an original idea or technological innovation." This trend dovetails with the culinary trend toward more scientific approaches to cuisine, as pioneered especially by the famed Spanish chef Ferran Adria at his Costa Brava restaurant El Bulli. These include complex forms of flavor distillation, "food foams," and unusual cooking techniques. The more culinary dishes resemble science projects, the more reasonable patents become.

“built” food (i.e., the recipe as “fixed” in tangible form for consumption). Neither form of creative expression is substantially protected by copyright.

Recipes are copyrightable only in a very limited sense. Copyright protects the “original expression” in a recipe, but does not extend to the procedures and methods that the recipe describes—in short, to those attributes that are the core of a recipe.

Accordingly, copyright protects mostly incidental expression. An example from Nigella Lawson’s cookbook *Nigella Bites* is instructive. In a prologue to her recipe for “Double Potato and Halloumi Bake,” Lawson claims that this simple dish has unappreciated virtues:

I first made this for a piece I was writing for Vogue on the mood-enhancing properties of carbohydrates... It’s a simple idea, and as simple to execute. What’s more, there’s a balance between the components: bland and sweet potatoes, almost caramelised onion and garlic, more juicy sweetness with the peppers and then the uncompromising plain saltiness of the halloumi (which you should be able to get easily in a supermarket) - that seems to add the eater’s equilibrium in turn . . . .

This piece of Lawson’s expression is copyrightable, and her musings on the mood-altering qualities of a glorified potato casserole may conceivably comprise part of the cookbook’s appeal. But for those who buy cookbooks to cook, rather than to read, it is the description of ingredients and necessary steps – the parts that are not covered or only glancingly covered by copyright – that make the book valuable. Yet the “[m]ere listing[ ] of ingredients” that typifies a recipe is simply an assemblage of facts. As such, it is outside the scope of copyright.<sup>140</sup>

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<sup>140</sup> See U.S. Copyright Office, Recipes, available at <[www.copyright.gov/fls/fl122.html](http://www.copyright.gov/fls/fl122.html)>. As David Nimmer pointed out to us, instructions merged with explanation in a cookbook are typically copyrightable. Thus when Lawson writes, apropos the Halloumi bake, “Season with black pepper, but no salt as the cheese will make it salty” that passage would probably qualify for copyright. Nimmer, personal communication, Jan 19, 2006.

What about the description of the steps that must be taken to prepare the dish? The U.S. Copyright Office has stated that “substantial literary expression” that accompanies a recipe “in the form of an explanation or directions” may be copyrightable.<sup>141</sup> But it is doubtful that most of the sentences in Lawson’s “instructions” pass this test. Accordingly, whatever copyright protection might arise is exceedingly thin. In short, the parts of Lawson’s recipe that seem the most valuable are outside the domain of copyright, and the situation is much the same for virtually all cookbooks.<sup>142</sup> And yet bookstore shelves (and our own) are groaning under the weight of cookbooks, many expensively produced and priced accordingly.

“Built” food – recipes made tangible in a box or on a plate – is even more remote from copyright, at least under current arrangements. And yet this situation could change. It is possible that built food endures long enough to be judged a “fixation” of the recipe in a tangible medium (i.e., the edible material). If so, then the built food is a derivative work – derivative, that is, of the recipe. But even if built food is evanescent – i.e., if, because it persists only until consumed, it does not meet the fixation requirement that the copyright laws ordinarily impose as a predicate – this would not cut off all possibility of protection. If recipes were protected, then the preparation of a particular recipe could be held to amount to a “performance” of the underlying work, which is one of the rights that the copyright laws reserve to the copyright holder.<sup>143</sup> Performances need not be “fixed” in order to implicate the copyright holder’s exclusive rights – the law grants the copyright owner exclusive authority to do or to authorize all *public* performances, regardless of

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<sup>141</sup> See *id.*; and Malla A. Pollack, Note, Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal, 12 *Cardozo L. Rev.* 1477 (1991).

<sup>142</sup> This is not to claim that intellectual property plays no important role in cookbooks: the selection of pictures is copyrightable, trademarks often matter, and the celebrity author/chef often has valuable rights of publicity.

<sup>143</sup> Copyright Act, sec. 106(4).

whether the performance is recorded or not.<sup>144</sup> So if copyright were expanded to include recipes, home preparation of a recipe would be permitted, but public preparations – food cooked in a restaurant – would require the permission of (i.e., a license from) the copyright owner.

That doesn't seem like an insane rule. Many restaurants are required to pay license fees to “publicly perform” musical works when they play a CD for the entertainment of their customers. Why shouldn't they also pay a fee when they entertain their customers with someone else's original recipe? After all, the food, rather than the music, is the restaurant's primary product. Current law allows free appropriation of both recipes and built food—and such appropriation is quite common, with chefs around the world imitating the innovative and popular creations of others<sup>145</sup>. But that arrangement, like the low-IP regime governing fashion, isn't set in stone. And a superficial application of the orthodox justification would suggest that culinary innovation would benefit from the protection of the law. Yet there is no meaningful effort to move to a higher-IP regime for either recipes or built food.

Food is another of IP's negative spaces. But while we are content to leave recipes without IP protection, history provides an interesting counter-example. The first recorded evidence we have of an IP system comes from third-century A.D. Greek author Athenaeus, who, quoting an earlier writer, reports that in the 6<sup>th</sup> century B.C., the inhabitants of Sybaris, the largest of the ancient Greek city-states, enforced short-term exclusivity in recipes: “[I]f any caterer or cook invented a dish of his own which was especially choice, it was his privilege that no one else but the inventor himself should adopt the use of it before the lapse of a year, in order that the first man to invent a dish might possess the right of manufacture during that period, so as to encourage others to

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<sup>144</sup> Id. See also Copyright Act, sec. 101 (definition of “publicly”).

<sup>145</sup> WSJ article, *supra* (6/24/06)

excel in eager competition with similar inventions.”<sup>146</sup> So our pleasure-seeking forebears chose to apply that justification to food – while we (voluptuaries in our own right) do not. We should understand why.<sup>147</sup>

## B. Other Elements in Copyright’s Negative Space

There are many other potential low-IP equilibria to examine, each with special relevance for the broader IP regime. These include:

- ***Furniture designs***, which are denied copyright protection for much the same reasons fashion designs are – furniture falls into the category of “useful articles”. And for reasons similar to those articulated in our analysis of the doctrine as applied to fashion, the useful articles rules as they apply to furniture are subject to change. Yet we see no campaign to move to a higher-IP rule.
- ***Tattoos*** are nominally subject to copyright as pictorial works, but until recently there has been little copyright litigation despite an apparent norm of wide-spread tattoo design copying.<sup>148</sup> Recently, a number of copyright lawsuits have been brought. What has changed?
- ***Computer databases*** are only lightly protected under U.S. law – the assembled facts themselves are unprotected, while the manner

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<sup>146</sup> Athenaeus, *The Deipnosophists*, trans. Charles Burton Gulick (London, New York, and Cambridge, Mass. 1927-41), V, 348-349.

<sup>147</sup> Work on this question has already begun. Recently, Emmanuelle Fauchart and Eric Von Hippel released an insightful draft paper documenting an informal, norms-based quasi-IP system that exists among a community of elite French chefs and regulates their use of others’ original recipes. See Emmanuelle Fauchart & Eric A. Von Hippel, *Norm-Based Intellectual Property Systems: The Case of French Chefs*, MIT Sloan Research Paper No. 4576-06, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=881781](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=881781). Fauchart and Von Hippel argue that this informal property system obviates the need for law-based IP protection for recipes. See also WSJ, *supra*, for hints that informal norms are not deemed sufficient by all parties.

<sup>148</sup> See Jordan S. Hatcher, *Drawing in Permanent Ink: A Look at Copyright in Tattoos in the United States*, \_\_\_\_\_ (forthcoming, 2006); Thomas Cotter and Angela Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, 10 *UCLA Entertainment L. Rev.* 97 (2003)

in which those facts are selected and arranged may be protected if sufficiently original and not dictated by the particular nature of the data or the function the database performs. In contrast, the E.U. has, beginning with its 1996 Database Directive,<sup>149</sup> created a Community-wide *sui generis* IP right that gives compilers of databases exclusive rights over their creations – including rights over collections of facts otherwise unprotectable under copyright law. In 2005 the European Commission completed a report analyzing the effect of the 1996 Database Directive on production of computer databases within the E.U.<sup>150</sup> The Commission’s report found that the Database Directive had not yet shown any effect in inducing additional production of databases in the E.U.: “The economic impact of the ‘sui generis’ right on database production is unproven. Introduced to stimulate the production of databases in Europe, the new instrument has had no proven impact on the production of databases.” In fact, the Commission’s study showed that the production of databases within the E.U. had fallen to pre-Directive levels, that the U.S. database industry, which operates in a relative low-IP environment, was growing faster than the E.U.’s, and that the measure by which the U.S. database industry outperforms the E.U.’s appeared to be growing. This outcome challenges the standard account of IP protection. The variance between E.U. and U.S. rules governing databases, and the lack of a clear connection between the E.U.’s high-IP regime and enhanced industry performance, recommends computer databases as another area for further study.

- ***Open-Source Software*** is created within a low-IP environment that exists *despite* nominally strong applicable IP rules. In this sense, open-source software is similar to the conduct of the fashion industry in the E.U., although the disjunction between nominal and actual legal rules arises in open-source software for a special reason. Software source code is copyrightable, and the algorithms and programming techniques that underlie source code are patentable subject matter. And yet participants in open-source programming projects engage in a variety of licensing and contractual arrangements that avoid the default rules of

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<sup>149</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996.

<sup>150</sup> See Commission of the European Communities, DG Internal Market and Services Working Paper, First Evaluation of Directive 96/9/EC on the Legal Protection of Databases (Brussels, Dec. 12, 2005).

copyright<sup>151</sup> and patent<sup>152</sup> and construct a cooperative low-IP regime. In doing so, open-source projects use the default rules of IP law as a lever to require those who use and modify open-source code to maintain that code's openness – an end that open-source projects pursue for a mix of ideological and economic motivations. Commentators have studied the incentives of programmers and others working in open-source projects. It is time now to look again at the open-source movement to more fully appreciate what it has become – an industry that attracts significant investment and engages in fast-moving innovation with a far lower degree of propertization than IP law would otherwise permit.

- The *microprocessor industry* is another potential example of a “contractual” low-IP equilibrium – albeit in this case industry characteristics are very different from what we find in fashion. The microprocessor industry clearly does not desire to operate in a “no-IP” equilibrium (the size of individual firms’ patent portfolios and the existence of important manufacturing and design trade secrets are testament to that), and competitors’ willingness to operate within a contractually-created regime that deemphasizes IP rights relative to what industry IP portfolios would otherwise permit applies only within the “charmed circle” of the industry’s small number of dominant firms. These firms engage in portfolio cross-licenses, thus freeing them to pursue architectural and manufacturing innovations without concern for the large number of overlapping and conflicting patent claims that might otherwise arise.<sup>153</sup> (Perhaps an added benefit, from the perspective of the large microprocessor firms, is the increased entry barriers that the portfolio cross licenses impose upon would-be upstarts that lack similarly comprehensive patent portfolios). [Does this fully account for Lemley’s objections to including semiconductors?]
- *Hairstyles*, which typically originate with celebrities, are freely copied by barbers and hairstylists. As with built food, hairstyles as rendered on a person’s head are probably not “fixed” in the manner demanded by the copyright law. But again, one might imagine the

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<sup>151</sup> See, e.g., GNU General Public License, available at <<http://www.gnu.org/copyleft/gpl.html>>.

<sup>152</sup> See, e.g., Eric Auchard, Linux Backers Form Patent Sharing Firm, available at <[http://news.yahoo.com/s/nm/20051110/tc\\_nm/linux\\_dc](http://news.yahoo.com/s/nm/20051110/tc_nm/linux_dc)>.

<sup>153</sup> See National Academies of Science, Patents in the Knowledge-Based Economy 190 (2003).

rule changing to extend protection to original “haircut designs”. A photograph of a haircut is already subject to copyright as a pictorial work. Many barbers and hairstylists have, in their shops, books of such photographs. One can imagine a rule providing that using one of these photographs as the template for a customer’s haircut is a public performance of a copyrighted work – the hairstyle design, as fixed in the photograph. Such a public performance may only be undertaken with the authorization of the copyright owner. Perhaps that authorization is given in exchange for the purchase of an “authorized” book of hairstyle photographs – the price of a license is included in the price paid for the book. Or perhaps the hairstyle design industry nominates a middleman – similar to the music industry’s ASCAP or BMI – to collect annual fees from individual haircutting shops for blanket licenses to perform a large number of copyrighted hairstyles.

- Competition in the illicit market for *heroin* apparently focuses heavily on branding<sup>154</sup> – i.e., on words and images stamped on packages of the drug that identify the product and establish product loyalty.<sup>155</sup> The duration of the “brands” is short, and the quality of the information conveyed is uncertain.<sup>156</sup> And of course heroin dealers are in no position to claim any formal IP protection for their “brands”, and therefore the words and designs stamped on heroin bags may be freely appropriated.<sup>157</sup> Additionally, marking heroin bags with brands is costly to dealers, in the sense that the branding may increase dealers’ risks by making it easier to connect a particular user with a seller.

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<sup>154</sup> We thank Rebecca Tushnet for this suggestion.

<sup>155</sup> P. J. Goldstein et al, “The marketing of street heroin in New York City”, *Journal of Drug Issues*, vol. 14, No. 3 (1984), pp. 553-566.

<sup>156</sup> T. Wendel and R. Curtis, “The heraldry of heroin: ‘dope stamps’ and the dynamics of drug markets in New York City”, *Journal of Drug Issues*, vol. 30, No. 2 (2000), pp. 225-260 (“The principle of product recognition, however, is undermined by the frequent manipulation of quality and many stamps last only a few days before being replaced. To compensate for this instability and create the illusion that users have choice, many distributors (particularly large organizations which could afford to do so) simultaneously issue several stamps. Users are aware that different stamps do not necessarily mean different heroin and that one of the bags might often be better than the rest.”).

<sup>157</sup> See Ryan Haggerty, Drug dealers pushing ‘brand loyalty’, post-gazette.com (June 8, 2006), available at <http://www.post-gazette.com/pg/06159/696634-85.stm> (quoting Pittsburgh police captain: “The problem is there’s no copyright law, so as soon as you put a good product on the street, people will copy your stamp.”)

So the market is heroin operates in a no-IP regime within which branding is rarely exclusive and potentially costly. And yet branding is a durable feature of heroin marketing. Why? A spate of recent deaths in Pittsburgh caused by “Get High or Die Trying” (see Figure M, directly below), a particularly potent form of heroin laced with fentanyl, an opioid pain-killer, suggests that heroin consumers believe that branding conveys some meaningful information. A frustrated Pittsburgh doctor offers his theory: “Dealers are competing for the best product . . . The word on the street is that this is the strongest stuff, so demand is high. I think the dealers, especially the high-level ones, know exactly what they’re doing.”<sup>158</sup> [Chris, isn’t this just an example of trying to use TM even tho it is not legally enforceable, and therefore no different than a contract between mobsters? I’m not sure this adds]



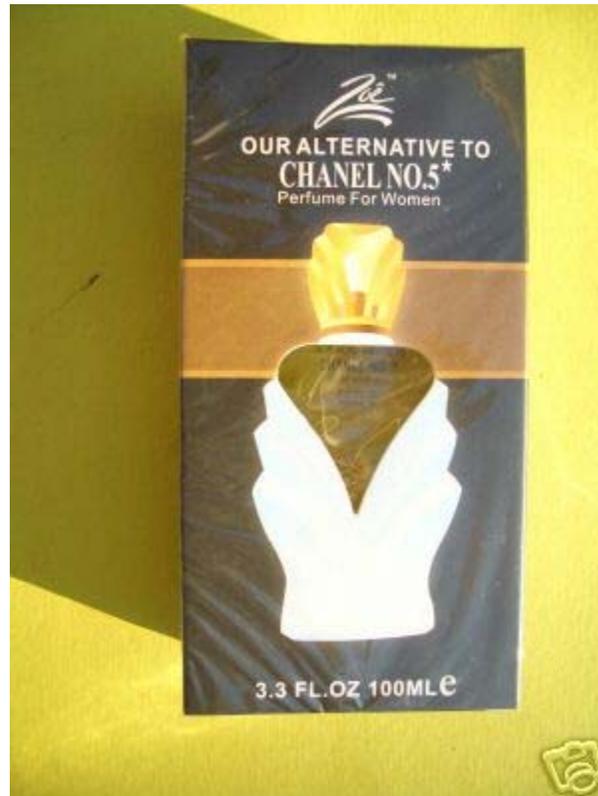
- Perhaps the most important product attribute of *perfume*,<sup>159</sup> its scent, is not protected by IP, though the trademark and often the trade dress (e.g., the design of the bottle) are legally protected against copying, and patents are granted on the *novel chemical composition* of certain perfumes (indeed, the United States Patent

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<sup>158</sup> Id.

<sup>159</sup> We thank Neil Netanel for this suggestion. Recently, two European courts have held that scent is copyrightable. In February 2006 a French court ruled that a perfume's scent can be copyrighted; see *Societe Bellure NV v. S.A. L'Oreal* at [http://breese.blogs.com/pi/files/CA\\_BELLURE.pdf](http://breese.blogs.com/pi/files/CA_BELLURE.pdf). A similar ruling was handed down in June 2006 by the Dutch Supreme Court. See *A.P., Court Upholds Ruling on L'Oreal Copyright*, June 16 2006.

and Trademark Office maintains a category for “Perfume Compositions” in its classification and search system).<sup>160</sup> A particular scent may, however, be produced by a variety of different chemical compositions, and therefore the patent system does not prevent the marketing of “smells like” knockoffs, such as the following (Figure N):<sup>161</sup>



Why scents are not protected by copyright, when sounds are, is not clear. It may be difficult for non-experts to detect similarity in scents, but it is often also difficult for the layperson to perceive the unauthorized appropriation in copyright cases involving music. In any event strong evidence of intent to copy – often arising from the manner in which a scent is marketed (see above), would help resolve otherwise difficult cases.

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<sup>160</sup> See United States Patent and Trademark Office, Class Definitions, Class 512, <http://www.uspto.gov/web/patents/classification/uspc512/defs512.htm#C512S001000>.

<sup>161</sup> For additional examples, see <http://www.imitationperfume.com/>.

With the exception of open source software, none of the areas mentioned above have been widely studied. That is understandable – from the perspective of most people interested in IP, industries that IP doesn't reach, or that have contracted out of IP, don't seem very interesting. But that view mistakes the means for the end. The means is IP, whereas the end is innovation. When we see innovation occurring over long periods of time, in the absence of the legal rules that are conventionally said to be innovation's necessary predicate, that should command our attention. The lack of protection in some of these areas may be explicable as resulting from their nature as necessities: we all need clothes, haircuts, furniture, and food, and indeed the useful articles doctrine is aimed at ensuring that useful things are excised from copyright's domain.<sup>162</sup> But even so, the fact that innovation continues apace in these areas that fall outside the reach of IP suggests that the connection drawn by the orthodox account between IP rules and innovation is less strong and direct than commonly believed. While a broader theory of the proper scope of intellectual property rules is beyond the ambit of this article, delimiting and exploring IP's negative space is clearly an important project, and one that has been surprisingly neglected.

## CONCLUSION

The proper scope and strength of intellectual property rights is the subject of intense debate. The orthodox view of IP demands strong legal protection of property rights, on the grounds that without such protections innovation will wither. Driven out by cheap copies that destroy the incentive to innovate, and that deter the investment that innovation demands, producers will fail to produce. This justification for IP rights has enjoyed overwhelming support in American law as well as international law, with the result that copyright, patent, and trademark have all expanded in strength and scope in recent years. In this article we have explored a very large industry in which IP law

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<sup>162</sup> We thank Mark Lemley for this suggestion.

protects some attributes—brands—but not others. Indeed, IP law fails to protect the core of fashion, which is design. Despite this lack of protection, the fashion industry continues to create new designs on a regular basis. The lack of copyright protection for fashion designs has not deterred investment in the industry. Nor has it reduced innovation in designs, which are plentiful each season. Fashion plainly provides an interesting and important challenge to IP orthodoxy.

We have argued that the lack of IP rights for fashion design has not quashed innovation, as the orthodox account would predict, and this has in turn reduced the incentive for designers to seek legal protection for their creations. Not only does the lack of copyright protection for fashion designs seem not have destroyed the incentive to innovate in apparel, it may have actually promoted it. This claim—that piracy is paradoxically beneficial for fashion designers—rests on some particular attributes of fashion, in particular the status-conferring, or positional, nature of clothing. We do not claim that fashion designers chose this low-IP system in any conscious or deliberate way. But we do claim that the highly unusual political equilibrium in fashion is explicable once we recognize its dynamic effects: that fashion’s cyclical nature is furthered and accelerated by a regime of open appropriation. It may even be, as one colleague suggested to us, that to stop copying altogether would be to kill fashion.<sup>163</sup>

The account we offer raises at least two larger questions about IP theory and policy. One is whether the positional nature of fashion is present in other creative industries, and if so, whether similar, if perhaps more muted, effects exist. Certainly music, for example, exhibits some degree of positionality. Artists who were once the darlings of audio cognescenti—a current example is Coldplay—become too popular, and hence unfashionable, for their original fanbase. These early adopter fans then move on to new bands and new styles. On the other hand, musical choices are more private than fashion choices and hence it is easier to maintain “guilty pleasures” in music than in

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<sup>163</sup> Email from Annette Kur, 10 February 2006

clothing. Either way, a general theory of fads and fashions and their connection to IP is beyond the agenda of this article. Here we seek only to signal that the status-based dynamics of the fashion industry may not be singular, and to the degree they are not singular they are worth investigating much more closely.

The second question raised by our account of innovation in fashion concerns the contours of IP's negative space. To better understand the proper domain of IP, we must consider those cases where IP rights are not present but innovation and creativity persist. Fashion is one such case, but not the only one. Above we noted several examples that arguably fall within this negative space, but our list is not exhaustive. Cataloging this negative space, and understanding what it contains and why, is an important task for legal scholars. It may well be that the two questions we raise are linked: that IP's negative space encompasses those creative endeavors that do not require state-sanctioned monopolies, and that all such endeavors remain creative (and consequently do not require protection) precisely because they exhibit positionality sufficiently strong that it provokes a constant stream of new innovation. If so, the existing constellation of legal protection is broadly rational. But without more study, we cannot be sure. Music, books, films, scientific innovations, and the like remain the core interests of IP scholars, and with good reason. But to better understand the domain of IP—and its boundaries—scholars need to consider more intensively the variety of creative endeavors that seem to thrive in the IP law's absence.